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[Network Version October 2017](#)

Amended from
Australian Standard™
**General conditions of contract for
design and construct**

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This Australian Standard was prepared by Committee OB/3, General Conditions of Contract. It was approved on behalf of the Council of Standards Australia on 7 September 1999 and published on 27 December 2000.

The following interests are represented on Committee OB/3:

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Australian Chamber of Commerce and Industry
Australian Procurement and Construction Council
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Construction Industry Engineering Services Group
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This Standard was issued in draft form for comment as DR 97528.

PREFACE

This Standard was prepared by the Joint Standards Australia/Standards New Zealand Committee OB/3, General Conditions of Contract.

This Standard incorporates Amendment No 1 (March 2005). The changes required by the Amendment are indicated in the text by a marginal bar and amendment number against the clause, note, table, figure or part thereof affected.

This Standard is the result of a consensus among Australian and New Zealand representatives on the Joint Committee to produce it as an Australian Standard.

AS 4902—2000 *General conditions of contract for design and construct*, is a part of the suite of conditions of contract based on AS 4000—1997 *General conditions of contract*.

This Standard covers the following types of project procurement methods:

- (a) design and construct;
- (b) design development and construct; and
- (c) design, novate and construct.

If the project procurement method chosen by the Principal is:

- (a) **design and construct**—the Principal would provide the Principal's project requirements, would not normally provide a detailed preliminary design and would not require novation;
- (b) **design development and construct**—the Principal would provide the Principal's project requirements, would always provide a preliminary design and accordingly would complete Annexure Part A Items 10 and 11;
- (c) **design, novate and construct**—the Principal would provide the Principal's project requirements, would always provide a preliminary design, would complete Annexure Part A Items 10 and 11 and would complete Annexure Part A Item 20 stating which subcontract (including consultant's agreement) or selected subcontract is to be novated to the Contractor.

Subclauses 8.6 and 29.2, prefixed by *, are optional, and may be omitted in the Contract, where necessary, without making consequential amendments but such omission should be clearly shown on the face of the document by striking out these subclauses or indicating clearly in clause 1 of Annexure Part E or elsewhere that they are *not to apply*. See paragraph (i) of clause 1 for the effect of stating deletions in Annexure Part E.

Warnings

- (1) **Users of this Australian Standard are warned that clause 15 (Damage to persons and property other than WUC) does not limit the liability of parties for special, indirect or consequential losses.**

This unlimited liability applies notwithstanding any limitations or exclusions permitted under insurance clauses 16A (Insurance of the Works), 16B (Professional indemnity insurance) and 17 (Public liability insurance).

Parties wishing to limit their liability should seek insurance and legal advice before entering a contract under this Standard.

- (2) **Principals should ensure that their specific requirements are fully and completely incorporated in the Principal's project requirements obtaining specialist advice if necessary. Where a Contractor provides a proposed design as part of its tender, the parties should consider whether that design should form part of the preliminary design.**

- (3) The risk allocation, drafting, interpretation and construction of this Standard are interrelated. Users who alter the Standard do so at their own risk and should obtain specialist advice as to whether it is suitable for a particular project.**
- (4) Contractors should ensure that they satisfy the requirements of payment for unfixed plant and materials.**
- (5) Legislation has come into force in some jurisdictions dealing with security of payments. Parties intending to use this Standard should seek expert advice as to their rights and obligations under such legislation.**

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STANDARDS AUSTRALIA

Australian Standard

General conditions of contract for design and construct

1 Interpretation and construction of Contract

1.1 Definitions

In the *Contract*, except where the context otherwise requires:

Item	means an <i>Item</i> in Annexure Part A ;
access agreements	means each Access Agreement (as defined in its respective Access Agreement Specific Terms Deed) entered into under the Access Agreement Specific Terms Deeds;
Access Agreement Specific Terms Deed	has the meaning given to that term in the Extension Project Agreement;
Access Legislation	has the meaning given to that term in the <i>Extension Project Agreement</i> ;
Access Regulator	has the meaning given to that term in the <i>Extension Project Agreement</i> ;
Access Seeker	has the meaning given to that term in the <i>Extension Project Agreement</i> ;
access undertaking	has the meaning given to that term in the <i>Extension Project Agreement</i> ;
adjustment event	has the meaning given in clause 35A ;
advance deduction amount	means the amount stated in Item 7C ;
advance payment	means the amount stated in Item 7B ;
allocation principles	means the principles which detail how any adjustments to the <i>contract sum</i> should be allocated across the different <i>Segments</i> , as contained in Annexure Part I ;
baseline contamination	means <i>contamination</i> on or under the <i>site</i> and its near surrounds (if any) identified in the <i>baseline site report</i> ;
baseline program	means the <i>program</i> for performance of the <i>WUC</i> , which at the date of this <i>Contract</i> is the program contained in Annexure Part H , as updated from time to time in accordance with clause 31 ;
baseline site conditions	means the physical conditions on the <i>site</i> and its near

	surrounds identified in the <i>baseline site report</i> ;
baseline site report	means the report (or reports) contained or referred to in Annexure Part G ;
business day	means any day other than a Saturday, Sunday, Public Holiday in Queensland or 27, 28, 29, 30 and 31 December;
capacity	means the capability of the rail infrastructure of the Relevant Coal System(s) to accommodate Train Services, after: <ul style="list-style-type: none"> (a) providing for the Contractor's reasonable requirements for the exclusive utilisation of that rail infrastructure for the purposes of performing activities associated with the maintenance, repair or enhancement of rail infrastructure, including the operation of work Trains; and (b) taking into account the System Operating Parameters applicable for that rail infrastructure;
capacity change	has the meaning given in subclause 25.1;
capacity shortfall	means a circumstance where the capacity change is less than the required extension capacity;
certificate of practical completion	has the meaning in subclause 33.6 ;
Claim	has the meaning given to that term the <i>Extension Project Agreement</i> ;
Coal System	has the meaning given to that term in the access undertaking;
compensable cause	means: <ul style="list-style-type: none"> (a) any act, default or omission of the <i>Independent Certifier</i>, the <i>Principal</i> or its consultants, agents or other contractors (not being a contractor employed by the <i>Contractor</i>); or (b) those listed in Item 31;
Compensation Payment	the amount of compensation payable by the <i>Contractor</i> to the <i>Principal</i> where the <i>Contract</i> is terminated by the <i>Principal</i> under subclause 38.4(b) , calculated in accordance with subclause 38.12 ;
Condition Precedent Satisfaction Date	has the meaning given to that term in the <i>Extension Project Agreement</i> ;
confidential information	of a <i>disclosing party</i> means: <ul style="list-style-type: none"> (a) the terms of this <i>Contract</i>; and (b) information disclosed (whether before or after the commencement of this <i>Contract</i>) by, or on behalf of,

the *disclosing party* to the *recipient* which:

- (i) is by its nature confidential or commercially sensitive;
 - (ii) is identified by the *disclosing party* as confidential or commercially sensitive;
 - (iii) the *recipient* knows or ought to know is confidential or commercially sensitive; or
 - (iv) relates to the business, operations or financial affairs of the *disclosing party* or a related body corporate of it,
- (v) but does not include information which:
- (vi) is or becomes public knowledge other than by breach of the *Contract* or by a breach of confidentiality by the *recipient* or any third party to whom the *recipient* has disclosed the information;
 - (vii) is in the possession of the *recipient* or a related body corporate of it without restriction in relation to disclosure before the date of receipt; or
 - (viii) has been independently developed or acquired by the *recipient* or a related body corporate of it;

consequential loss

means:

- (a) any loss of profits, loss of production, loss of revenue or wasted overheads;
- (b) any loss of whatever nature concerning the supply of product from a mine to any third party or the making of product available to transport;
- (c) any loss of business opportunities;
- (d) any loss of or damage to goodwill or reputation;
- (e) any loss of or damage to credit rating; and
- (f) any loss or damage that does not naturally, according to the usual course of things, flow from a breach of contract,

but does not include, and the exclusion in **clause 43.2** does not apply to, any of the following *Claims* to the extent that the party that has suffered or incurred such loss would in the absence of this definition be entitled to recover them at law:

- (a) any additional costs or expenses reasonably incurred by that party in connection with mitigating the effects of any breach of the *Contract* by the other party (including

implementing a workaround solution in respect of or otherwise mitigating any failure of a party to comply with the requirements (including warranties) of the *Contract* provided that if a loss arising from the breach of the *Contract* is itself not recoverable because it is a *Consequential Loss*, the costs or expenses incurred in mitigating that loss shall also be treated as (non-recoverable) *Consequential Loss*;

- (b) a *Loss* (including a *Loss* arising out of a *Claim* by a third party) in respect of:
 - (i) the cost of repairing, replacing or reinstating any real or personal property of any person (including the *Contractor* or the *Principal*) that has been lost, damaged or destroyed; or
 - (ii) personal injury to or death of any person;
- (c) in respect of any personal injury claim, special loss or economic loss as those terms are used in the context of personal injury claims;
- (d) any liquidated damages for which that party is liable under the *Contract* or compensation pursuant to **subclause 38.12**;
- (e) the break fee pursuant to **subclause 39.2**; or
- (f) any fines or penalties imposed by a governmental or regulatory body for failure by that party to comply with any *legislative requirement* as a result of the other party's failure to comply with the requirements of the *Contract*, and any costs or expenses incurred by the that party in dealing with any actions, investigations, inquiries or proceedings by a governmental or regulatory body in respect of such failures or breaches;

construction plant

means appliances and things used in the carrying out of *WUC* but not forming part of *the Works*;

consultant

means any person engaged by the *Contractor* to perform consultancy services in connection with *WUC*;

contamination

means the presence on, in, over or under land (including surface, subsurface and ground water) of a substance (including odours) or heat, sound, vibration or radiation at a concentration or intensity above the concentration or intensity at which the substance, heat, sound, vibration or radiation is normally or naturally present on, in, over or under that land (including surface, subsurface and ground water) in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment;

Contract	means the contract comprising the documents listed in the <i>Formal Instrument of Agreement</i> as together forming the contract;
contract sum	means the lump sum payable by the <i>Principal</i> to the <i>Contractor</i> to complete <i>the Works</i> , as specified in clause 2 of the <i>Formal Instrument of Agreement</i> , including <i>provisional sums</i> but excluding any <i>pre-funding payment</i> ;
Contractor	means the person bound to carry out and complete <i>WUC</i> ;
Contractor's design obligations	means all tasks necessary to design and specify <i>the Works</i> required by the <i>Contract</i> , including preparation of the design documents and, if the documents stated in Item 10 as describing the <i>Principal's project requirements</i> include a <i>preliminary design</i> , developing the <i>preliminary design</i> ;
Contractor's Requirements	means the standards, safety management system requirements and other rail infrastructure requirements from time to time of the Contractor in its capacity as Rail Infrastructure Manager of the rail infrastructure.
date for practical completion	means the date provided in Item 7 , but if any <i>EOT for practical completion</i> is directed by the <i>Independent Certifier</i> , granted by the <i>Principal</i> or allowed in any expert determination or litigation, it means the date resulting therefrom;
date of practical completion	means: <ul style="list-style-type: none"> (a) the date evidenced in a <i>certificate of practical completion</i> as the date upon which <i>practical completion</i> was reached; or (b) where another date is determined in any expert determination or litigation as the date upon which <i>practical completion</i> was reached, that other date;
defect	means any: <ul style="list-style-type: none"> (a) defect, shrinkage, movement, error, omission, deficiency or other imperfection in <i>the Works</i> in respect of, or arising from, any cause including design, materials or workmanship; (b) aspect of <i>the Works</i> which is not in accordance with this <i>Contract</i>; or (c) physical damage to the <i>Works</i> resulting from any of the matters referred to in paragraphs (a) and (b) of this definition;
defects rectification period	has the meaning given in Item 32 ;

defects register	has the meaning given in subclause 34.2(a) ;
Depreciating Asset	means an asset that satisfies section 40-30 of the <i>Income Tax Assessment Act 1997</i> (Cth);
design documents	means the drawings, specifications and other information, samples, models, patterns and the like required by the <i>Contract</i> and created (and including, where the context so requires, those to be created by the <i>Contractor</i>) for the construction of <i>the Works</i> ;
direction	includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement;
disclosing party	has the meaning in subclause 8.5(a) ;
discretionary variation	has the meaning in subclause 35.1 ;
dispute	has the meaning in clause 41 ;
EOT (from ‘extension of time’)	has the meaning in subclause 33.3 ;
excepted risk	has the meaning in subclause 14.3 ;
Expansion	has the meaning given to that term in the <i>access undertaking</i> ;
Extension	has the meaning given to that term in the <i>Unit Holders Deed</i> ;
existing capacity	means the capacity of the relevant rail infrastructure without the Extension as at the date of this Contract;
Extension Infrastructure Sub-Lease	has the meaning given to that term in the <i>Extension Project Agreement</i> ;
Extension Land	has the meaning given to that term in the <i>Rail Corridor Agreement</i> ;
Extension Project Agreement	means the agreement entitled “ <i>User Funding – Extension Project Agreement: [insert Extension name]</i> ” between the <i>Principal</i> , the <i>Contractor</i> and others;
Financier’s Engineer	<i>[Drafting note: subject to confirmation that financiers will be appointing a separate engineer]</i>
final certificate	has the meaning in subclause 36.4 ;
final payment	has the meaning in clause 36 ;
final payment claim	means the final payment claim referred to in subclause 36.4 ;
force majeure event	means: <ul style="list-style-type: none"> (a) storm surge, earthquake, tsunami, typhoon, tornado, cyclone, dust storms, flood, fire, explosion, washaway, landslide, catastrophe, and/or other natural calamity or

physical disaster;

- (b) riot, piracy, war, invasion, terrorist act, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, blockade or civil commotion;
- (c) malicious damage or sabotage;
- (d) ionising radiation or contamination by radioactivity;
- (e) failure of electricity supply from the electricity grid;
- (f) embargo or sanctions arising from any act of any government or other authority or agency;
- (g) epidemic, pandemic, or quarantine restriction;
- (h) pressure waves caused by aircraft or other aerial devices travelling at sonic or super-sonic speeds;
- (i) maritime or aviation disasters;
- (j) the discovery of unexploded ordnance; and
- (k) encountering any species of flora or fauna which delays the *WUC* because it poses a danger to health and safety or due to the requirement to protect or conserve that flora or fauna; and

(l) train or motor vehicle accident

(m) but only to the extent that:

- (n) ~~(n)~~ it is beyond the reasonable control of (and not caused by) the party claiming the *force majeure event* (including any *subcontractor* or any agent or employee of any of them); and
- (o) ~~(m)~~ the risk is not expressly assumed elsewhere in the *Contract* by one of the parties;

Formal Instrument of Agreement

means the formal instrument of agreement forming part of this *Contract*;

GST

has the meaning given in the GST Law;

GST Law

has the meaning given to that expression in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

Independent Certifier

means the person appointed to carry out the *Independent Certifier Services* on the terms of the *Independent Certifier Deed* in accordance with **clause 19**;

Independent Certifier Deed

means the document so entitled between the *Independent Certifier*, the *Principal*, the *Contractor* and the *Access Regulator*, which is in the form (or substantially in the form) of the document contained in **Annexure Part K**;

Independent Certifier Services	means the services required to be performed by the <i>Independent Certifier</i> under the <i>Independent Certifier Deed</i> and the administration of this <i>Contract</i> and the performance of duties which this <i>Contract</i> requires the <i>Independent Certifier</i> to perform;
insolvency event	<p>means in respect of either party:</p> <p>(a) notice is given of a meeting of creditors with a view to the party entering a deed of company arrangement;</p> <p>(b) it enters a deed of company arrangement with creditors;</p> <p>(c) a controller or administrator is appointed;</p> <p>(d) an application is made to a court for its winding up and not stayed within 14 days;</p> <p>(e) a winding up order is made in respect of it;</p> <p>(f) it resolves by special resolution that it be wound up voluntarily (other than for a member's voluntary winding up); or</p> <p>(g) a mortgagee of any of its property takes possession of that property; <u>has the meaning given to that term in the Extension Infrastructure Sub-Lease;</u></p>
Insurance Schedule	means the schedule contained in Annexure Part F ;
Integrated Network Deed	has the meaning given to that term in the <i>Extension Project Agreement</i> ;
intellectual property right	means any patent, registered design, trademark or name, copyright or other protected right;
joint claim	has the meaning given to that term in subclause 33.5B ;
Landholder Requirements	has the meaning given to that term in the <i>Rail Corridor Agreement</i> ;
latent condition	has the meaning in subclause 24.1 ;
legislative requirement	includes: <ul style="list-style-type: none"> (a) Acts, Ordinances, regulations, by-laws, orders, awards and proclamations of the jurisdiction where <i>WUC</i> or the particular part thereof is being carried out; (b) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the carrying out of <i>WUC</i>; and (c) fees and charges payable in connection with the foregoing;
Loss	has the meaning given to that term the <i>Extension Project</i>

Agreement;

minimum capacity change	means the minimum capacity change stated in <i>Item 38</i>;
payment claim	means a claim for payment made by the <i>Contractor</i> under clause 36 ;
peak exposure date	means the date on which the <i>termination exposure amount</i> is greater than on any other day during the term of this <i>Contract</i> , calculated in reference to the projected termination costs modelling contained in Annexure Part E ;
peak termination exposure	means the amount stated in Item 7D , being the <i>termination exposure amount</i> on the <i>peak exposure date</i> , calculated with reference to the project termination costs modelling contained in Annexure Part E (which modelling will have regard to the amount of any <i>advance payment</i> projected to be made by the <i>Principal</i> under the <i>Contract</i> in determining the <i>termination exposure amount</i>);
practical completion	is that stage in the carrying out and completion of <i>WUC</i> when: <ul style="list-style-type: none"> (a) <i>the Works</i> are complete in accordance with the requirements of this <i>Contract</i> (including the <i>Principal's project requirements</i>) except for minor <i>defects</i>: <ul style="list-style-type: none"> (i) which do not prevent <i>the Works</i> from being reasonably capable of being used for their stated purpose; (ii) which the <i>Independent Certifier</i> determines the <i>Contractor</i> has reasonable grounds for not promptly rectifying; and (iii) the rectification of which will not prejudice the convenient use of <i>the Works</i>; (b) <i>those tests</i> which are required by the <i>Contract</i> to be carried out and passed before <i>the Works</i> reach <i>practical completion</i> have been carried out and passed; (c) <i>documents</i> and other information required under the <i>Contract</i> which, in the <i>Independent Certifier's</i> opinion, are essential for the use, operation and maintenance of <i>the Works</i> have been supplied; and (d) the <i>Contractor</i> in its <i>capacity</i> as "Rail Infrastructure Manager" has certified that <i>the Works</i> are ready to enter operational service;
Preference Unit Holder	has the meaning given to that term in the <i>Unit Holders Deed</i> ;
pre-funding payment	means the amount payable by the <i>Principal</i> for feasibility and other work undertaken by the <i>Contractor</i> in respect of <i>the</i>

	<i>Works</i> prior to the date of this <i>Contract</i> , being the amount stated in Item 7A ;
pre-termination work	has the meaning in subclause 39B(a) ;
preliminary design	means the documents stated in Item 11 ;
prescribed notice	has the meaning in subclause 40.1 ;
pricing information	means any pricing or cost information in relation to: <ul style="list-style-type: none"> (a) the conduct of <i>WUC</i> other than <i>WUC</i> undertaken by <i>subcontractors</i> or suppliers of the <i>Contractor</i>; and (b) the conduct of <i>WUC</i> undertaken by <i>subcontractors</i> or suppliers of the <i>Contractor</i> if, and to the extent that, such information falls within the scope of a defined set of information which is agreed between the <i>Contractor</i> and the applicable <i>subcontractor</i> or supplier (at the time of entry into the applicable subcontract or supply agreement) as being pricing information;
Principal	means the <i>Principal</i> stated in Item 1 ;
Principal's Approvals	means the certificates, licences, consents, permits and approvals specified in Item 9A which must be obtained by the <i>Principal</i> ;
Principal's Engineer	means the person appointed by the <i>Principal</i> (and notified to the <i>Contractor</i> and the <i>Independent Certifier</i>) to inspect the progress of the <i>WUC</i> on behalf of the <i>Principal</i> ;
Principal's project requirements	means the <i>Principal's</i> written requirements for <i>the Works</i> described in the documents stated in Item 10 which: <ul style="list-style-type: none"> (a) shall include the stated purpose for which <i>the Works</i> are intended; (b) may include the <i>Principal's</i> design, timing and cost objectives for <i>the Works</i>; and (c) where stated in Item 10, shall include a <i>preliminary design</i>;
program	has the meaning in clause 31 ;
progress certificate	has the meaning in subclause 36.1(d) ;
progress payment	has the meaning in subclause 36.1(h) ;
provisional sum	has the meaning in clause 3 and includes monetary sum, contingency sum and prime cost item;
public liability policy	has the meaning in clause 16 ;
QCA Act	means the <i>Queensland Competition Authority Act 1997</i> (Qld);
QCA determination	means a determination made by the <i>Access Regulator</i> in respect of the <i>Extension</i> ;

qualifying cause of delay	means: <ul style="list-style-type: none"> (a) any act, default or omission of the <i>Independent Certifier</i>, the <i>Principal</i> or its consultants, agents or other contractors (not being employed by the <i>Contractor</i>) including a delay by the <i>Independent Certifier</i> in certifying the price of a <i>discretionary variation</i> under subclause 35.3(a)(i); (b) an <i>adjustment event</i>; or (c) any event or delay which this <i>Contract</i> provides gives rise to an entitlement for the <i>Contractor</i> to claim an <i>EOT</i>;
Rail Corridor Agreement	has the meaning given to that term in the <i>Extension Project Agreement</i> ;
rail infrastructure	means rail transport infrastructure (as defined under the <i>TIA</i>) for which the <i>Contractor</i> is the owner, lessee or sublessee (including, for the avoidance of doubt, the rail infrastructure of the <i>Extension</i>), the use of which is declared for the purposes of Part 5 of the <i>Access Legislation</i> pursuant to section 250(1)(a) of the <i>Access Legislation</i> ;
Rail Infrastructure Manager	has the meaning given to that term in the <i>Transport (Rail Safety National Law (Queensland) Act 2010</i> <i>2017</i> (Qld);
recipient	has the meaning in subclause 8.5(a) ;
Redundant Extension Infrastructure	means “Redundant Extension Infrastructure” as defined in: <ul style="list-style-type: none"> (a) the <i>Extension Infrastructure Head-Lease</i>; and/or (b) the <i>Extension Infrastructure Sub-Lease</i>;
Regulatory Asset Base	has the meaning given to that term in the <i>access undertaking</i> ;
Relevant Coal-Systems(s)	means the <i>Coal System</i> or <i>Coal Systems</i> on which the <i>Extension</i> is or is intended to be commissioned for use;
required rating	has the meaning in subclause 5.2 ;
required-extension-capacity<u>scope difference</u>	means the new capacity to be created by the <i>Extension</i> sufficient to meet the <i>train service entitlements</i> (any part of the scope in the <i>Principal’s project requirements</i> set out in Annexure Part B that as a result of a <i>QCA determination</i>: <ul style="list-style-type: none"> (a) <u>is different to the scope for the <i>Works</i> included in the <i>Contractor’s</i> documents or submissions to the <i>QCA</i> as part of the <i>Expansion Process</i>; and</u> (b) <u>requires the <i>Contractor</i> to construct that part of the <i>Works</i> to a standard that is not in accordance with the <i>Contractor’s Requirements</i>.</u>

	(c) details of which capacity cannot include existing capacity); are set out in Annexure Part M
security	has the meaning given to that term in subclause 5.1(a) ;
Segments	has the meaning to that term in the <i>Unit Holders Deed</i> ;
separable portion	means a portion of <i>the Works</i> identified as such in the Separable Portion Annexure ;
site	means the lands and other places to be made available and any other lands and places made available to the <i>Contractor</i> by the <i>Principal</i> for the purpose of the <i>Contract</i> ;
subcontractor	in clause 3 includes a <i>consultant</i> ;
substantial breach	means: <ul style="list-style-type: none"> (a) in respect of the <i>Contractor</i>, the breaches of this <i>Contract</i> listed in subclause 38.2; and (b) in respect of the <i>Principal</i>, the breaches of this <i>Contract</i> listed in subclause 38.7;
System Operating-Parameters	has the meaning given to that term in the access-undertaking;
temporary works	means <i>work</i> used in carrying out and completing <i>WUC</i> , but not forming part of <i>the Works</i> ;
termination exposure amount	means the amount which would be payable to the <i>Contractor</i> if the <i>Contract</i> was terminated under subclauses 32.5, 35A.3(b) or 39.1 ;
test	has the meaning in subclause 29.1 and includes examine and measure;
TIA	has the meaning given to that term in the <i>Extension Infrastructure Sub-Lease</i> ;
Train	has the meaning given to that term in the <i>access undertaking</i> ;
Train Service	has the meaning given to that term in the access-undertaking;
train service entitlements	means the aggregate of the entitlement of the Access-Seekers pursuant to the access-agreements to operate or cause to be operated a specified number and type of Train-Services over the rail infrastructure including within a specified period and in accordance with specified scheduling constraints and for the purpose of either carrying a specified commodity or providing a specified Transport Service;
Transaction Document and Transaction Documents	have the meaning given to those terms in the <i>Extension Project Agreement</i> ;

Trust Administration Costs	has the meaning given to that term in the <i>Unit Holders Deed</i> ;
unexpected contamination	means any <i>contamination</i> at the <i>site</i> which is not <i>baseline contamination</i> ;
Unit Holders Deed	has the meaning given to that term in the <i>Extension Project Agreement</i> ;
WHS Act	means the <i>Work Health and Safety Act 2011</i> (Qld);
the Works	means the whole of the <i>work</i> to be carried out and completed in accordance with the <i>Contract</i> , including work that occurs as a result of <i>discretionary variations</i> or <i>adjustment events</i> provided for by the <i>Contract</i> , which by the <i>Contract</i> is to be handed over to the <i>Principal</i> ;
work	includes the provision of materials;
work site	means each part of the <i>site</i> or place <i>WUC</i> is to be performed and other obligations under the <i>Contract</i> fulfilled; and
WUC (from ‘work under the Contract’)	means the <i>work</i> which the <i>Contractor</i> is or may be required to carry out and complete under the <i>Contract</i> and includes any <i>work</i> that occurs as a result of <i>discretionary variations</i> or <i>adjustment events</i> , remedial <i>work</i> , <i>construction plant</i> and <i>temporary works</i> ,

and like words have a corresponding meaning.

1.2 Interpretation

In the *Contract*:

- (a) references to days mean calendar days and references to a person include an individual, firm or a body, corporate or unincorporate;
- (b) time for doing any act or thing under the *Contract* shall, if it ends on a day that is not a *business day*, be deemed to end on the day next following which is a *business day*;
- (c) clause headings and subclause headings shall not form part of, nor be used in the interpretation of, the *Contract*;
- (d) words in the singular include the plural and words in the plural include the singular, according to the requirements of the context. Words importing a gender include every gender;
- (e) communications between the *Principal*, the *Independent Certifier* and the *Contractor* shall be in the English language;
- (f) measurements of physical quantities shall be in legal units of measurement of the jurisdiction in **Item 8**;
- (g) unless otherwise provided, prices are in the currency in **Item 9(a)** and payments shall be made in that currency at the place in **Item 9(b)**; and
- (h) the law governing the *Contract*, its interpretation and construction, and any agreement to arbitrate, is the law of the jurisdiction in **Item 8**.

1.3 Contra proferentum

In the interpretation of this *Contract* no rule of construction applies to the disadvantage of one party on the basis that the party put forward or drafted this *Contract* or any provision in it.

2 Nature of Contract

2.1 Performance and payment

The *Contractor* shall carry out and complete *WUC* in accordance with the *Contract* and *directions* authorised by the *Contract*.

The *Principal* shall pay the *Contractor* for the due and proper performance of the carrying out and completion of *WUC* the *contract sum* adjusted by any additions or deductions made pursuant to the *Contract*.

2.2 Contractor's warranties

- (a) ~~Without~~ Subject to subclauses 2.2(b) and 2.2(c), and without limiting the generality of **subclause 2.1**, the *Contractor* warrants to the *Principal* that the *Contractor*:
- (i) at all times shall be suitably qualified and experienced, and shall exercise due skill, care and diligence in the carrying out and completion of *WUC*;
 - (ii) has examined any *preliminary design* included in the *Principal's project requirements* and that such *preliminary design* is suitable, appropriate and adequate for the purpose stated in the *Principal's project requirements*;
 - (iii) shall carry out and complete the *Contractor's design obligations* to accord with the *Principal's project requirements*; and
 - (iv) shall carry out and complete *WUC* in accordance with the *design documents* so that *the Works*, when completed, shall:
 - (A) be fit for their stated purpose; and
 - (B) comply with all the requirements of the *Contract*.
- ~~(b) Without limiting the Contractor's obligations and liabilities under clauses 25 and 33.7A, the Principal acknowledges and agrees:~~
- ~~(i) the~~ The *Contractor* ~~has not made any representations~~ provides no warranty to the *Principal* as to whether the railway, as augmented by the *Works* ~~or the Extension will achieve the required extension capacity or the minimum capacity change;~~ and ~~(ii) in entering into the Contract the Principal has not relied upon any representations as to capacity by the Contractor and in relation to the capacity change achieved by the Extension and the Works, the Principal relies only on the rights related to capacity set out in the Contract.~~ will fulfil the incremental capacity requirements of the Principal or any capacity requirements stated in the Principal's project requirements.
- ~~(c) The Contractor provides no warranty to the Principal that any part of the Works or the WUC required which is a scope difference will be fit for its stated purpose and the warranty under subclause 2.2(a)(iv)(A) shall not apply in respect of any scope difference.~~

2.3 Warranties unaffected

The warranties remain unaffected notwithstanding:

- (a) that design *work* (including the *preliminary design*) has been carried out by or on behalf of the *Principal* and included in the *Principal's project requirements*;
- (b) any receipt or review of, or comment or *direction* on, the *design documents* by the *Independent Certifier*; or
- (c) any *discretionary variation* or *adjustment event*.

3 Provisional sums

A *provisional sum* included in the *Contract* shall not itself be payable by the *Principal* but where pursuant to a *direction* the *work* or item to which the *provisional sum* relates is carried out or supplied by the *Contractor*, the *work* or item shall be priced by the *Independent Certifier*, and the difference shall be added to or deducted from the *contract sum*.

Where any part of such *work* or item is carried out or supplied by a *subcontractor*, the *Independent Certifier* shall allow the amount payable by the *Contractor* to the *subcontractor* for the *work* or item, disregarding:

- (a) any damages payable by the *Contractor* to the *subcontractor* or vice versa; and
- (b) any deduction of cash discount for prompt payment,

plus an amount for profit and attendance calculated by using the percentage thereon stated in **Item 13** or elsewhere in the *Contract*, or, if not so stated, as assessed by the *Independent Certifier*.

4 Separable portions

The interpretations of:

- (a) *date for practical completion*;
- (b) *date of practical completion*;
- (c) *practical completion*;
- (d) *certificate of practical completion*; and
- (e) *defects rectification period*,

and **clauses 5, 14, 16, 33, 34, and 36.4** will apply separately to each *separable portion* and references therein to *WUC* and *the Works* will mean so much of those things as is comprised in the relevant *separable portion*.

[Drafting note: A Separable Portion may (but will not always) be the same as a Segment. Segments are a different concept (used to determine cost contributions between Preference Unit Holders), whereas Separable Portions may encompass parts of a number of Segments being discrete physical components of work.]

5 Security

5.1 Provision

- (a) Within 10 *business days* of the *Condition Precedent Satisfaction Date* the *Principal* shall provide the *Contractor* ~~as security for the *Principal's* payment obligations under **subclause 38.10** and **clause 39B**~~ the *Contract*, bank guarantees in aggregate equal to the *peak termination exposure* ('*security*').
- (b) *Security* provided in accordance with **subclause 5.1(a)** must satisfy the requirements listed in **subclause 5.2**.

5.2 Requirements of security

Security must:

- (a) be in the form contained in **Annexure Part J** (or such other form as the *Contractor* may approve);
- (b) be in favour of the *Contractor*;
- (c) be unconditional; and
- (d) be at all times provided by an issuer bank that maintains the credit rating stated in **Item 14** (the '*required rating*').

5.3 Recourse

The *Contractor* may only have recourse to the *security* if:

- (a) the: (i) *Contractor* is entitled to ~~compensation from the *Principal* pursuant to **subclause 38.10** because of a termination by the *Contractor* pursuant to **subclause 38.9**; or (ii) *Principal* is responsible to pay the *Contractor* for *pre-termination work* pursuant to **clause 39B** because the *Contractor* has terminated the *Contract* pursuant to **subclause 38.9**~~ payment of an amount from the *Principal* under the *Contract*;
- (b) the *Contractor* remains unpaid by the *Principal* for any ~~of the amounts specified in **subclause 5.3(a)**~~ amounts it is entitled to be paid under the *Contract* after the time for payment for that amount pursuant to the terms of the *Contract*; and
- (c) at least 5 days have elapsed since the *Contractor* notified the *Principal* of its intention to have recourse to the *security*.

5.4 Replacement Security

If:

- (a) any *security* provided by the *Principal* under this **clause 5** has an expiry date; or
- (b) the credit rating of the entity providing the *security* under this **clause 5** falls below the minimum specified in **clause 5.2**,

the *Principal* shall provide a replacement *security* to the *Contractor* which complies with all requirements stipulated in this **clause 5**:

- (c) in the case of (a) above, by the date which is fourteen (14) days before the date on which the relevant *security* is due to expire; or

- (d) in the case of **(b)** above, within fourteen (14) days of the credit rating falling below the minimum required by this **clause 5**,

and such replacement *security* shall be effective from the date of receipt.

Subclause 5.4 does not require the *Principal* to issue a replacement *security* where the date by which the *Contract* requires the *Contractor* to return a *security* to the *Principal* predates the expiry date of that *security*.

The *Contractor* shall simultaneously return the original *security* to the *Principal* in exchange for a replacement *security* which complies with all requirements stipulated in this **clause 5**.

5.5 Reduction and release

Subject to its rights to have recourse to the *security*, the *Contractor* must upon the written request of the *Principal* on or after the *peak exposure date* release the *security* as follows:

- (a) when the value (as assessed by the *Independent Certifier*) of the *termination exposure amount* is less than or equal to 75% of the *peak termination exposure*, that part of the *security* so that the amount of the *security* held by the *Contractor* is equal to 75% of the *peak termination exposure*;
- (b) when the value (as assessed by the *Independent Certifier*) of the *termination exposure amount* is less than or equal to 50% of the *peak termination exposure*, that part of the *security* so that the amount of the *security* held by the *Contractor* is equal to 50% of the *peak termination exposure*;
- (c) when the value (as assessed by the *Independent Certifier*) of the *termination exposure amount* is less than or equal to 25% of the *peak termination exposure*, that part of the *security* so that the amount of the *security* held by the *Contractor* is equal to 25% of the *peak termination exposure*; and
- (d) when the value (as assessed by the *Independent Certifier*) of the *termination exposure amount* is 0% of the *peak termination exposure*, any remaining *security*.

5.6 Trusts and interest

Any interest earned on the *security* will be retained by the *Contractor*. The *Contractor* shall not hold the *security* or the proceeds of the *security* on trust.

5.7 Not used

5.8 Quantum of Security

The parties acknowledge and expressly agree that this *Contract* is not subject to the condition that may otherwise be implied by section 67K(2) of the *Queensland Building and Construction Commission Act 1991* (Qld). Section 67K(2) implies a condition into building contracts that the total value of security and retention moneys held prior to *practical completion* is not to be more than 5% of the contract price, unless the contract expressly provides otherwise.

By initialling this **subclause 5.8** in the space provided below, the parties expressly agree that this *Contract* is not subject to the condition imposed by section 67K(2) and explained above.

Initialed for and on behalf of the Contractor:

Initialed for and on behalf of the Principal:.....

6 Evidence of Contract

The *Formal Instrument of Agreement* is evidence of the *Contract* once it has been executed by the parties.

7 Service of notices

A notice (and other documents) shall be deemed to have been given and received:

- (a) if addressed or delivered to the relevant address in the *Contract* or last communicated in writing to the person giving the notice; and
- (b) on the earliest date of:
 - (i) actual receipt;
 - (ii) confirmation of correct transmission of fax; or
 - (iii) 3 days after posting.

8 Contract documents

8.1 Discrepancies

When construing the documents which together form the *Contract* the following rules of construction apply:

- (a) in the event of any inconsistency between the documents which form the *Contract*, the order of precedence is provided in clause 5 of the *Formal Instrument of Agreement*; and
- (b) figured shall prevail over scaled dimensions in a discrepancy.

Otherwise, if either party discovers any inconsistency, ambiguity or discrepancy in any document in the documents which form the *Contract*, that party shall give the *Independent Certifier* written notice of it. The *Independent Certifier*, thereupon, and upon otherwise becoming aware, shall direct the *Contractor* as to the interpretation and construction to be followed.

If any *direction* under this subclause directs that any discrepancy, ambiguity or discrepancy be resolved other than in accordance with the order of precedence in clause 5 of the *Formal Instrument of Agreement* and this causes the *Contractor* to incur more or less cost than otherwise would have been incurred had the *direction* not been given, the *direction* shall be an *adjustment event* and the *Contractor* will be entitled to claim an adjustment to the *contract sum* in accordance with **clause 35A**.

Otherwise, the *Contractor* shall bear the cost of compliance with a *direction* under this subclause.

8.2 Principal-supplied documents

The *Principal* shall supply to the *Contractor* the documents and number of copies thereof, both stated in **Item 16**.

They shall:

- (a) remain the *Principal's* property and be returned to the *Principal* on written demand; and
- (b) not be used, copied nor reproduced for any purpose other than *WUC*.

8.3 Contractor-supplied documents

The *Contractor* shall supply to the *Independent Certifier* the documents and number of copies at the times or stages stated in **Item 17**.

Other documents and information required by the *Contract*, unless elsewhere stated in the *Contract*, shall be supplied not less than 14 days before the *work* described in the documents is commenced and shall be in a form satisfactory to the *Independent Certifier*.

If the *Contractor* submits a document to the *Independent Certifier*, then except where the *Contract* otherwise provides:

- (a) the *Independent Certifier* shall not be required to check that document for errors, omissions, inconsistencies, ambiguities, discrepancies or compliance with the *Contract*;
- (b) any *Independent Certifier's* acknowledgment, comment or approval shall not affect the warranties given by the *Contractor* or prejudice the *Contractor's* obligations under the *Contract*; and
- (c) if the *Contract* requires the *Contractor* to obtain the *Independent Certifier's direction* about that document, the *Independent Certifier* shall give, within the time stated in **Item 18**, the appropriate *direction*, including reasons if the document is not suitable.

The *Contractor* may rely on an *Independent Certifier's direction* to change any documents submitted to the *Independent Certifier* by the *Contractor* unless and until such *direction* is amended or overturned by a determination under **clause 41** of this Contract. If:

- (a) a *direction* is made by the *Independent Certifier* to change a document submitted pursuant to this **subclause 8.3**;
- (b) the *Contractor* notifies the *Independent Certifier* in writing before any *WUC* is performed in reliance upon the changed document that it is of the view that the change was not necessary for compliance with the *Contract* and the *Independent Certifier* does not reverse the *direction* to change the relevant document (or does so after some *WUC* has been performed in reliance upon the *direction* of the *Independent Certifier*); and
- (c) the *directed* change is determined under **clause 41** of this Contract to have not been required for the relevant document to comply with the *Contract*, the *Independent Certifier's direction* under this clause shall be treated as an *adjustment event* under **clause 35A** (where the *Independent Certifier* reversed its *direction* after some *WUC* had been performed in reliance upon the *direction*, the *adjustment event* ends upon the *Independent Certifier's* reversal of the *direction*).

The *Contractor's* right under this **subclause 8.3** to rely on an *Independent Certifier's* direction does not limit or otherwise affect any warranty given by the *Contractor* under the *Contract*.

Copies of documents supplied by the *Contractor* shall be the *Principal's* property but shall not be used nor copied otherwise than for the use, repair, maintenance or alteration of *the Works*.

8.4 Availability

The *Contractor* shall keep available to the *Independent Certifier* and the *Principal* one complete set of documents affecting *WUC* (supplied by a party or the *Independent Certifier*):

- (a) on site, until the *date of practical completion* (or where there are *separable portions*, the last *date of practical completion*); and
- (b) at the *Contractor's* corporate office, for a period of 7 years after the *date of practical completion* (or where there are *separable portions*, the last *date of practical completion*).

8.5 Confidential information

- (a) Without limiting the rights and obligations of either party under another *Transaction Document* with respect to confidentiality, a party ('*recipient*'):
 - (i) may use *confidential information* of the other party ('*disclosing party*') only for the purposes of the *Contract*; and
 - (ii) must keep confidential all *confidential information* of a *disclosing party* except for disclosures permitted under **subclause 8.5(b)**.
- (b) A *recipient* may disclose *confidential information* of a *disclosing party*:
 - (i) where disclosure is compelled by law;
 - (ii) where the *disclosing party* is seeking to have any *work* pre-approved by the *Access Regulator*, to the *Access Regulator*, or if disclosure is lawfully required by the *Access Regulator*;
 - (iii) to the *Independent Certifier*, *Principal's Engineer* or an independent expert appointed in accordance with this *Contract*;
 - (iv) to those employees and agents of the *recipient* who need to know or use *confidential information* of the *disclosing party*;
 - (v) where disclosure is authorised in writing by the *disclosing party*; or
 - (vi) where the information is in the public domain other than through a breach of this **subclause 8.5**.
- (c) This **subclause 8.5** shall survive the termination of the *Contract*.

8.6 Media

Neither party shall disclose any information concerning the project for distribution through any communications media without the other party's prior written approval (which shall not be unreasonably withheld).

8.7 Variation pricing information

- (a) The parties agree that other than in accordance with **subclauses 8.7(b) to 8.7(e)** inclusive nothing in the *Contract* requires the *Contractor* to disclose *pricing information* in relation to the *contract sum* to the *Principal*, the *Independent Certifier*, the *Principal's Engineer* nor *Financier's Engineer* and the *Contractor* will not be required to disclose any *pricing information* in relation to the *contract sum* to the *Principal*, the *Independent Certifier*, the *Principal's Engineer* nor *Financier's Engineer*.
- (b) At the written request of the *Principal* the *Contractor* will disclose *pricing information* to the *Principal* if such disclosure is necessary for the *Principal* to assess or agree any *provisional sum* or the amount of any adjustment to the *contract sum* ~~or a discretionary variation in accordance with clause 35 in respect of an adjustment event~~ provided that:
- (i) the *Principal* will only use the *pricing information* for the purposes described in **subclause 8.7(b)** and will not disclose *pricing information* to any person other than those employees and agents of the *Principal* who need to know or use that information in connection with those purposes; and
 - (ii) without limiting subclause 8.7(b)(i), the *Principal* ~~may~~**must not** disclose ~~the~~ *pricing information* to any *Preference Unit Holders* or *Access Seekers* ~~where it is reasonable to provide that information~~.
- (c) At the written request of the *Independent Certifier* the *Contractor* will disclose *pricing information* to the *Independent Certifier* provided that such disclosure is necessary for the *Independent Certifier* to carry out the *Independent Certifier Services*.
- (d) At the written request of the *Access Regulator* the *Contractor* will disclose *pricing information* to the *Access Regulator* provided that:
- (i) such disclosure is necessary for the *Access Regulator* to carry out its statutory functions as regulator in respect of the *Transaction Documents*; and
 - (ii) the Access Regulator first enters into a confidentiality agreement with the Contractor whereby the Access Regulator agrees to keep pricing information confidential in accordance with the terms of this subclause 8.7.
- (e) The parties agree that: ~~(i)~~ the *Independent Certifier* may share *pricing information* with the *Principal's Engineer* and *Financier's Engineer* if required by that person to properly carry out its duties, provided that the *Principal* will procure that the *Principal's Engineer* and *Financier's Engineer* do not share *pricing information* with any person other than the *Independent Certifier*; ~~and~~
- (ii) ~~the Access Regulator may share pricing information with any person in accordance with the Access Legislation or the access undertaking.~~

9 Assignment and subcontracting

9.1 Assignment

Neither party shall, without the other's prior written approval (including approval of the terms of the assignment) assign the *Contract* or any payment or any other right, benefit or interest

thereunder other than as permitted in accordance with the terms of clauses [11.4 and/or 11.5 of] the *Extension Project Agreement*.

9.2 Principal granting security

The *Contractor* consents to the *Principal* granting security over its rights under this *Contract* in accordance with clause [16.6] of the *Integrated Network Deed*.

9.3 Not used

9.4 Not used

9.5 Contractor's responsibility

Except where the *Contract* otherwise provides, the *Contractor* shall be liable to the *Principal* for the acts, defaults and omissions of *subcontractors* and employees and agents of *subcontractors* as if they were those of the *Contractor*.

10 Intellectual property rights

10.1 Warranties and indemnities

- (a) The *Principal* warrants that other than any design, materials, documents and methods of working warranted by the *Contractor* under **subclause 10.1(b)**, the *Principal's project requirements* shall not infringe any *intellectual property right*.
- (b) The *Contractor* warrants that any design, materials, documents and methods of working provided by the *Contractor*, including any provided to the *Principal* by or on behalf of the *Contractor* which form part of the *Principal's project requirements*, shall not infringe any *intellectual property right*. The *Contractor* must acquire sufficient *intellectual property rights* from *subcontractors* and suppliers to enable it to comply with this subclause.
- (c) Each party shall indemnify the other against such respective infringements.

10.2 Not used

11 Legislative requirements

11.1 Compliance

The *Contractor* shall satisfy all *legislative requirements* except those in **Item 22(a)** which are to be satisfied by or on behalf of the *Principal*.

The *Contractor*, upon finding that a *legislative requirement* is at variance with the *Contract* or the *Principal's project requirements*, shall as soon as reasonably practicable give the *Independent Certifier* and the *Principal* written notice thereof.

11.2 Changes

- (a) If any change in a *legislative requirement*:
 - (i) necessitates a change:
 - (A) to the *Principal's project requirements*;

- (B) to the Works;
 - (C) to so much of *WUC* as is identified in **Item 22(b)**;
 - (D) to an order or award of the jurisdiction where *WUC* (or a particular part thereof) is being carried out;
 - (E) ~~(D)~~ being the provision of services by a municipal, public or other statutory authority in connection with *WUC*; or
 - (F) ~~(E)~~ in a fee or charge or payment of a new fee or charge;
- (ii) the change comes into effect between:
 - (A) the date of this *Contract*; and
 - (B) the *date of practical completion*; and
 - (iii) causes the *Contractor* to incur more or less cost than otherwise would have been incurred,

that change will be treated as an *adjustment event* and the *Contractor* will be entitled to an adjustment to the *contract sum* in accordance with **clause 35A**.

- (b) The parties agree that no changes in legislative requirements have been priced into the *contract sum* as at the date of the *Contract*.

11.3 Approvals

- (a) The *Principal* must obtain *Principal's Approvals*.
- (b) The *Contractor* shall obtain and maintain, at the *Contractor's* cost and expense, all approvals (other than *Principal's Approvals*) necessary for the lawful design and construction of *the Works* and carrying out the *WUC*.

11.4 Workplace Health and Safety

- (a) For the purpose of this **subclause 11.4** the words "*Principal Contractor*", "*serious bodily injury*", "*work-related illness*" and "*work injury*" have the meanings assigned to them by the *WHS Act*.
- (b) On and from the date of this *Contract*, and from time to time during the term of the *Contract*, for each *work site*:
 - (i) the *Principal* shall appoint the *Contractor* (or a nominee of the *Contractor* identified by the *Contractor*) to be the *Principal Contractor* pursuant to the *WHS Act*;
 - (ii) the *Contractor* (or its nominee) shall be deemed to have accepted the appointment; and
 - (iii) the *Contractor* (or its nominee) shall in respect of the *work* to be executed under the *Contract* be responsible for the performance of the functions of *Principal Contractor* at the relevant *work site* within the meaning of the *WHS Act* and regulations thereto.
- (c) If any person other than the *Contractor* or its nominee is appointed by the *Principal* as *Principal Contractor* for any *work site*:

- (i) the *Principal* must consult with the *Contractor* prior to such appointment; and
 - (ii) the *Principal* must procure that the person so appointed carries out its functions as *Principal Contractor* in a manner which is not inconsistent with the *Contractor's* role as *Rail Infrastructure Manager*.
- (d) An appointment of the *Contractor* (or its nominee) as *Principal Contractor* under the *WHS Act* shall continue during the currency of this *Contract* until the *date of practical completion* unless sooner suspended or revoked by the *Principal* giving notice in writing to the *Contractor* of its suspension or revocation, or by the *Principal* terminating this *Contract* pursuant to any provision of this *Contract* or according to law.
- (e) The *Contractor* shall notify the *Independent Certifier* and the *Principal* of every *work-related illness, work injury or serious bodily injury* which occurs on the *site* as soon as possible after such occurrence.

11.5 Rail safety

The *Principal* acknowledges and agrees:

- (a) the *Contractor* is the *Rail Infrastructure Manager* in respect of the railway, including the *Works*; and
- (b) it will (and ensure its employees, agents and other contractor's will) in respect of the performance of the *WUC* and the safe operation of the *site* comply with all directions on safety matters given by the *Contractor* to ensure compliance with its obligations as *Rail Infrastructure Manager*.

12 Protection of people and property

Insofar as compliance with the *Contract* permits, the *Contractor* shall:

- (a) take measures necessary to protect people and property;
- (b) avoid unnecessary interference with the passage of people and vehicles; and
- (c) prevent nuisance and unreasonable noise and disturbance.

If the *Contractor* damages property, the *Contractor* shall as soon as reasonably practicable rectify the damage and pay any compensation which the law requires the *Contractor* to pay.

13 Not used

14 Care of the work and reinstatement of damage

14.1 Care of WUC

Except as provided in **subclause 14.3**, the *Contractor* shall be responsible for care of:

- (a) the whole of *WUC* from and including the date of commencement of *WUC* to 4.00 pm on the *date of practical completion*, at which time responsibility for the care of the *Works* (except to the extent provided in **paragraph (b)**) shall pass to the *Principal*; and

- (b) outstanding *work* and items to be removed from the *site* by the *Contractor* after 4.00 pm on the *date of practical completion* until completion of outstanding *work* or compliance with **clauses 28, 29** and **34**.

Without limiting the generality of **paragraph (a)**, the *Contractor* shall be responsible for the care of unfixed items accounted for in a *progress certificate* and the care and preservation of things entrusted to the *Contractor* by the *Principal* or brought onto the *site* by *subcontractors* for carrying out *WUC*.

14.2 Reinstatement

If loss or damage, other than that caused by an *excepted risk*, occurs to *WUC* during the period of the *Contractor's* care, the *Contractor* shall at its cost, rectify such loss or damage.

In the event of loss or damage being caused by any of the *excepted risks* (whether or not in combination with other risks), the *Contractor* shall to the extent directed by the *Principal*, rectify the loss or damage and any such *work* will be an *adjustment event* and will entitle the *Contractor* to an adjustment to the *contract sum* in accordance with **clause 35A**. If loss or damage is caused by a combination of *excepted risks* and other risks, the *Independent Certifier* in pricing the adjustment to the *contract sum* shall assess the proportional responsibility of the parties.

14.3 Excepted risks

The *excepted risks* causing loss or damage, for which the *Principal* is liable, are:

- (a) any negligent act or omission of the *Principal* or its consultants, agents, employees or other contractors (not being employed by the *Contractor*);
- (b) any risk specifically excepted elsewhere in the *Contract*;
- (c) terrorism, war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any Government or public authority;
- (d) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the *Contractor* or its *subcontractors* or either's employees or agents;
- (e) use or occupation of any part of *WUC* by the *Principal* or its consultants, agents or other contractors (not being employed by the *Contractor*); and
- (f) defects in such part of the design of *WUC*, including the *preliminary design* provided by the *Principal*, as is not warranted under **clause 2**.

14.4 Title in the Works

Title in work, goods, components, parts or materials provided by the *Contractor* in the performance of the *WUC* shall pass to the *Principal* as soon as incorporated into the *Works*.

15 Damage to persons and property other than WUC

15.1 Indemnity by Contractor

Insofar as this **subclause 15.1** applies to property, it applies to property other than *WUC*.

The *Contractor* shall indemnify the *Principal* against:

- (a) loss of or damage to the *Principal's* property; and
- (b) claims in respect of personal injury or death or loss of, or damage to, any other property,

arising out of or as a consequence of the carrying out of *WUC*, but the indemnity shall be reduced proportionally to the extent that the act or omission of the *Principal* or its consultants, agents or other contractors (not being employed by the *Contractor*) may have contributed to the injury, death, loss or damage.

This **subclause 15.1** shall not apply to:

- (a) the extent that the *Contractor's* liability is limited by another provision of the *Contract*;
- (b) exclude any other right of the *Principal* to be indemnified by the *Contractor*;
- (c) things for the care of which the *Contractor* is responsible under **subclause 14.1**; and
- (d) claims in respect of the *Principal's* right to have *WUC* carried out under an approval or permit obtained or to be obtained by the *Principal*.

15.2 Indemnity by Principal

The *Principal* shall indemnify the *Contractor* in respect of claims referred to in **subclause 15.1(d)**.

16 Public liability insurance

Before commencing *WUC*, the *Contractor* shall effect and maintain for the duration of the *Contract*, a *public liability policy*.

The policy shall:

- (a) be in the joint names of the parties;
- (b) cover the:
 - (i) respective rights and interests; and
 - (ii) liabilities to third parties,

of the parties, the *Independent Certifier*, *consultants* and *subcontractors* from time to time, whenever engaged in *WUC*;

- (c) cover the parties' respective liability to each other for loss or damage to property (other than property required to be insured by **clause 16A**) and the death of or injury to any person (other than liability which the law requires to be covered under a workers compensation insurance policy);
- (d) be endorsed to cover the use of any *construction plant* not covered under a comprehensive or third party motor vehicle insurance policy;
- (e) provide insurance cover for an amount in respect of any one occurrence of not less than the sum in **Item 25**; and
- (f) be with an insurer and otherwise in terms both approved in writing by the *Principal* (which approvals shall not be unreasonably withheld). The parties agree that the insurance arrangements described in the *Insurance Schedule* are approved by the *Principal*.

16A Insurance of the Works

Before commencing *WUC*, the *Contractor* shall insure all the things referred to in **subclause 14.1** against loss or damage resulting from an insurable cause until the *Contractor* ceases to be responsible for their care.

Without limiting the generality of the obligation to insure, such insurance shall cover the *Contractor's* liability under **subclause 14.2** and things in storage off *site* and in transit to the *site* but may exclude:

- (g) the cost of making good fair wear and tear or gradual deterioration, but shall not exclude the loss or damage resulting therefrom;
- (h) the cost of making good faulty design, workmanship and materials, but shall not exclude the loss or damage resulting therefrom;
- (i) *consequential loss* of any kind, but shall not exclude loss of or damage to *the Works*;
- (j) damages for delay in completing or for the failure to complete *the Works*;
- (k) loss or damage resulting from ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel resulting from any cause; and
- (l) loss or damage resulting from the *excepted risks* referred to in **subclause 14.3**.

The insurance cover shall be for the amount specified in **Item 23**.

Insurance shall be in the joint names of the parties, shall cover the parties, *consultants* and *subcontractors* whenever engaged in *WUC* for their respective rights, interests and liabilities and, except where the *Contract* otherwise provides, shall be with an insurer and in terms both approved in writing by the *Principal* (which approvals shall not be unreasonably withheld). The parties agree that the insurance arrangements described in the *Insurance Schedule* are approved by the *Principal*.

The insurance shall be maintained until the *Contractor* ceases to be responsible under **subclause 14.1** for the care of *the Works*.

16B Professional indemnity insurance

Before commencing *WUC*, the *Contractor* shall effect and maintain professional indemnity insurance with levels of cover not less than stated in **Item 24(a)**.

The insurance shall be maintained until the *final certificate* is issued and thereafter for the period as stated in **Item 24(b)**.

The *Contractor* shall ensure that every *consultant*, if within a category stated in **Item 24(c)**, shall effect and maintain professional indemnity insurance with levels of cover not less than stated in **Item 24(c)** applicable to that category.

Each such *consultant's* professional indemnity insurance shall be maintained until the *final certificate* is issued and thereafter for the period as stated in **Item 24(d)**.

17 Insurance of employees

Before commencing *WUC*, the *Contractor* shall insure against statutory and common law liability for death of or injury to persons employed by the *Contractor*. The insurance cover shall be maintained until completion of all *WUC*.

Where permitted by law, the insurance policy or policies shall be extended to provide indemnity for the *Principal's* statutory liability to the *Contractor's* employees.

The *Contractor* shall ensure that all *consultants* and *subcontractors* have similarly insured their employees.

18 Inspection and provisions of insurance policies

18.1 Proof of insurance

Before the *Contractor* commences *WUC* and whenever reasonably requested by the *Principal*, the *Contractor* shall provide to the *Principal* certificates of currency in respect of insurance required to be effected and maintained by the *Contractor* under this *Contract*.

Insurance shall not limit liabilities or obligations under other provisions of the *Contract*.

18.2 Not used

18.3 Notices from or to insurer

Except for insurance of employees as required by **clause 17**, the *Contractor* shall ensure that each insurance policy contains provisions which:

- (a) requires the insurer to inform both parties, whenever the insurer gives a party or a *consultant* or a *subcontractor* a notice in connection with the policy;
- (b) provides that a notice of claim given to the insurer by either party, the *Independent Certifier*, a *consultant* or a *subcontractor* shall be accepted by the insurer as a notice of claim given by both parties, the *Independent Certifier*, the *consultant* and the *subcontractor*; and

- (c) requires the insurer, whenever the *Contractor* fails to maintain the policy, promptly to give written notice thereof to both parties and prior to cancellation of the policy.

18.4 Notices of potential claims

The *Contractor* shall, as soon as practicable, inform the *Principal* in writing of any occurrence that may give rise to a claim under an insurance policy required by **clauses 16A** or **16** and shall keep the *Principal* informed of subsequent developments concerning the claim. The *Contractor* shall ensure that *consultants* and *subcontractors* in respect of their operations similarly inform the parties.

18.5 Settlement of claims

Upon settlement of a claim under the insurance required by **clause 16A**:

- (a) to the extent that reinstatement has been the subject of a payment or allowance by the *Principal* to the *Contractor*, if the *Contractor* has not completed such reinstatement, insurance moneys received shall, if requested by either party, be paid into an agreed bank account in the joint names of the parties. As the *Contractor* reinstates the loss or damage, the *Independent Certifier* shall certify against the joint account for the cost of reinstatement; and
- (b) to the extent that reinstatement has not been the subject of a payment or allowance by the *Principal* to the *Contractor*, the *Contractor* shall be entitled immediately to receive from insurance moneys received, the amount of such moneys so paid in relation to any loss suffered by the *Contractor*.

18.6 Cross liability

Any insurance required to be effected in joint names in accordance with the *Contract* shall include a cross liability clause in which the insurer agrees to waive all rights of subrogation or action against any of the persons constituting the insured and for the purpose of which the insurer accepts the term 'insured' as applying to each of the persons constituting the insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby).

19 Independent Certifier

- (a) Unless appointed prior to the date of this *Contract*, the *Independent Certifier* will, as soon as possible after the date of this *Contract*, be appointed (jointly) by the parties and the *Access Regulator* under the *Independent Certifier Deed* to carry out the *Independent Certifier Services*.
- (b) The *Contractor* and the *Principal* agree that the form of *Independent Certifier Deed* at **Annexure Part K** is agreed as between the *Contractor* and the *Principal* and that the *Contractor* and the *Principal* must act reasonably in consenting or refusing consent to any proposed changes to the form of *Independent Certifier Deed* at **Annexure Part K** sought by a party, the *Access Regulator* or the proposed *Independent Certifier*.
- (c) The *Principal* and the *Contractor* acknowledge and agree that the *Independent Certifier* must act fairly, reasonably, honestly, independently and in accordance with the timeframes and requirements set out in this *Contract* in carrying out the functions

required of the *Independent Certifier* under this *Contract*, including the terms and scope of services set out in the *Independent Certifier Deed*.

- (d) The costs of the *Independent Certifier* will be borne by the *Principal*. For the avoidance of doubt, such costs have not been allowed for in the *contract sum*.
- (e) If the *Independent Certifier Deed* is terminated for any reason, the *Independent Certifier* retires, resigns or goes on extended leave or the *Independent Certifier* is unable to continue in that role for any reason, the *Principal* and the *Contractor* will appoint another person on substantially the same terms as the terms of the *Independent Certifier Deed* and the *Principal* and the *Contractor* will enter into an *Independent Certifier Deed* with that replacement or new *Independent Certifier*.
- (f) If the replacement *Independent Certifier* has not been appointed within 20 *business days* of the date on which a replacement is proposed by a party, the parties will accept the appointment of the person nominated by the *Access Regulator* and that person will be appointed *Independent Certifier* in accordance with this **clause 19**.

20 Not used

21 Representatives

- (a) Each of the *Principal* and the *Contractor*:
 - (i) will ensure a person is appointed as its representative under this *Contract*;
 - (ii) may (subject to **subclause 21(a)(iii)**) at any time replace any person appointed as its representative, in which event that party will appoint another person as its representative; and
 - (iii) must give 5 *business days* prior written notice of a replacement under **subclause 21(a)(ii)** to the other party and the *Independent Certifier*.
- (b) Each of the *Principal* and the *Contractor* appoint the persons named in **Item 25A** as their representatives at the date of this *Contract*.
- (c) A representative appointed by a party under this **clause 21**:
 - (i) will be authorised to act on behalf of that party in enforcing its rights and discharging its obligations under this *Contract*; and
 - (ii) matters within that representative's knowledge shall be deemed to be within the knowledge of the party which appointed it.

22 Not used

23 Site

23.1 Access and possession

Subject to **subclause 35A.3.3**, the *Contractor* has and agrees to maintain sufficient possession of the *site* to enable the *Contractor* to carry out and complete the *WUC* on the *site*.

The *Principal* acknowledges and agrees that, subject to the following paragraph, the *Contractor* may, prior to the *date of practical completion*, use (at the *Contractor's* risk, including in relation to its own losses and liabilities and in relation to any damage to the *Works* caused by such use) for the purpose of running trains on the operational railway network such parts of the *Works* which:

- (a) interface with the operational railway network; and
- (b) the *Contractor* (in its capacity as “Rail Infrastructure Manager”) has certified is ready to enter operational service.

23.2 Access for Principal and others

The *Principal* and the *Principal's* employees, consultants and agents (including the *Principal's Engineer*) may at any time after reasonable written notice to the *Contractor* have access to any part of the *site* for the purpose of inspecting the progress of the *WUC* in accordance with the *Landholder Requirements* under the *Rail Corridor Agreement*.

The *Contractor* shall at all reasonable times give the *Independent Certifier* access to *WUC*.

The *Principal* shall ensure that none of the persons referred to in this **subclause 23.2** impedes the *Contractor*.

23.3 Minerals, fossils and relics

Valuable minerals, fossils, articles or objects of antiquity or of anthropological or archaeological interest, treasure trove, coins and articles of value found on the *site* shall as between the parties be and remain the property of the *Principal*. Immediately upon the discovery of these things the *Contractor* shall:

- (a) take precautions to prevent their loss, removal or damage; and
- (b) give the *Independent Certifier* written notice of the discovery.

Encountering such objects shall be an *adjustment event* and any costs so incurred by the *Contractor* under this **subclause 23.3** shall entitle the *Contractor* to an adjustment to the *contract sum* in accordance with **clause 35A**.

24 Latent conditions

24.1 Scope

Latent conditions are physical conditions on the *site* and its near surrounds, including artificial things but excluding weather conditions, which differ materially from the *baseline site conditions*.

24.2 Notification

The *Contractor*, upon becoming aware of a *latent condition* while carrying out *WUC*, shall promptly, and where possible before the *latent condition* is disturbed, give the *Independent Certifier* written notice of the general nature thereof.

If required by the *Independent Certifier* promptly after receiving that notice, the *Contractor* shall, as soon as practicable, give the *Independent Certifier* a written statement of:

- (a) the *latent condition* encountered and the respects in which it differs materially from the *baseline site conditions*;
- (b) the additional *work*, resources, time and cost which the *Contractor* estimates to be necessary to deal with the *latent condition*; and
- (c) other details reasonably required by the *Independent Certifier*.

The parties agree that if the *Contractor* provides a notice and claims under **subclause 35A.2(a)** in respect of a *latent condition* it will be taken to have satisfied the requirement to make a written statement under this **subclause 24.2**.

24.3 Adjustment Event

Encountering a *latent condition* shall be an *adjustment event* and shall entitle the *Contractor* to an adjustment to the *contract sum* in accordance with **clause 35A**.

24.4 Baseline conditions

The *Contractor* confirms that all work necessary to overcome all *baseline site conditions* so that *the Works* are completed in accordance with the *Contract* has been allowed for in the *contract sum* and the *baseline program*.

25 ~~Capacity~~ Not Used

25.1 ~~Capacity analysis~~

~~The *Contractor* will, no more than six (6) months after the *date of practical completion* and as required by **subclause 25.3(a)(ii)** and **subclause 25.4(a)(ii)**, undertake an assessment of the change in capacity arising as a result of the *Extension* ('*capacity change*') calculated as the *capacity*:~~

- ~~(a) for the original assessment under **subclause 25.1**, immediately after the *date of practical completion* (and where there is more than one *date of practical completion*, the last to occur); or~~

- (b) ~~for reassessments required by **subclause 25.3(a)(ii)** and **subclause 25.4(a)(ii)**, at the time of the reassessment;~~

less the aggregate of:

- (c) ~~the *existing capacity*; and~~
- (d) ~~the aggregate *capacity* arising as a result of each *Expansion* (other than the *Extension*) commissioned for use since the date of this *Contract*,~~

~~using consistent *System Operating Parameters*. The *Contractor* must notify the *Principal* of the conclusions of that assessment and the basis for those conclusions.~~

25.2 Result of analysis

~~If the *Contractor's* assessment under **subclause 25.1** indicates that there is a *capacity shortfall* in relation to the *Access Seekers*, then:~~

- (a) ~~if the *capacity change* is less than the *minimum capacity change*, **subclause 25.3** applies; and~~
- (b) ~~if the *capacity change* is equal to or greater than the *minimum capacity change*, **subclause 25.4** applies.~~

25.3 Capacity change less than the minimum capacity change

- (a) ~~If an assessment under **subclause 25.1** identifies that the *capacity change* is less than the *minimum capacity change* then, subject to the provisions of the *Contract*, the *Contractor* must with due diligence, promptly (as determined by the *Independent Certifier*) and at its own cost:~~
 - (i) ~~make such adjustments, modifications or additions to the *WUC* as may be necessary to increase the *capacity change* so that it is equal or greater than the *minimum capacity change*; and~~
 - (ii) ~~undertake a further assessment in accordance with **subclause 25.1**.~~
- (b) ~~If, as verified upon the same assessment after the making of adjustments, modifications or additions as required by **subclause 25.3(a)**, the *capacity change* remains less than the *minimum capacity change* then **subclause 25.3(a)** will continue to apply.~~
- (c) ~~However, if:~~
 - (i) ~~the *Contractor* does not act promptly or diligently as required by **subclause 25.3(a)**; or~~
 - (ii) ~~after 2 or more reassessments pursuant to **subclause 25.3(a)(ii)** the *capacity change* remains less than the *minimum capacity change*,~~

~~then the *Principal* may, in its absolute discretion, by notice in writing to the *Contractor* and the *Independent Expert* elect to recover liquidated damages pursuant to **subclause 33.7A** instead of the *Contractor* continuing attempts at making adjustments, modifications or additions pursuant to **subclause 25.3(a)**. If the *Principal* issues such a notice, it is entitled to recover liquidated damages pursuant to **subclause 33.7A** and **subclause 25.4** will not apply.~~

- (d) ~~If, as verified upon the same assessment after the making of adjustments, modifications or additions as required by **subclause 25.3(a)**, there remains a capacity shortfall but the capacity change is equal to or greater than the minimum capacity change then **subclause 25.4** will apply.~~

25.4 Capacity change equal to or greater than the minimum capacity change

- (a) ~~If this **subclause 25.4** applies pursuant to **subclauses 25.2(b)** or **25.3(c)** then, subject to the provisions of the *Contract*, the *Contractor* may (but is not obliged to) promptly and with due diligence and at its own cost:~~
- (i) ~~make one attempt at such adjustments, modifications or additions to the *WUC* as may be necessary to increase the capacity change so that it is equal or greater than the minimum capacity change; and~~
 - (ii) ~~undertake a further assessment in accordance with **subclause 25.1**.~~
- (b) ~~If the *Contractor*:~~
- (i) ~~does not exercise its rights under **subclause 25.4(a)** promptly and with due diligence (both as determined by the *Independent Certifier*), then the *Principal* is entitled to liquidated damages pursuant to **subclause 33.7A**; and~~
 - (ii) ~~does exercise its rights under **subclause 25.4(a)** promptly (as determined by the *Independent Certifier*), then the *Principal* is entitled to liquidated damages pursuant to **subclause 33.7A** following the further assessment in accordance with **subclause 25.1**.~~

25.5 Costs

~~All costs in connection with any assessments pursuant to **subclause 25.1** shall be borne by the *Contractor*.~~

25A Contamination

- (a) The *Contractor* shall comply, and ensure its employees, *subcontractors* and suppliers comply, with all *legislative requirements* in relation to *contamination*.
- (b) Should any *contamination* on, under or emanating from the *site*:
- (i) be disturbed or exacerbated by the carrying out of the *WUC*; or
 - (ii) otherwise arise out of or in connection with the course of the *WUC*,
- the *Contractor* shall:
- (iii) give the *Independent Certifier* written notice providing details of the nature of the *contamination*;
 - (iv) dispose of, or otherwise deal with, such *contamination* in accordance with any *legislative requirements*; and
 - (v) remediate the *site* and any other affected areas in accordance with any applicable *legislative requirements*.

- (c) The *Contractor* confirms all work necessary to overcome and remove or remediate *baseline contamination*, as required by this **clause 25A**, has been allowed for in the *contract sum* and the *baseline program*.
- (d) The parties agree that:
 - (i) the *Principal* takes the risk of any *contamination* which is *unexpected contamination*, other than *unexpected contamination* which is caused by the negligence or breach of this *Contract* by the *Contractor* ; and
 - (ii) removing or remediating *unexpected contamination* (or otherwise incurring increased costs as a result of encountering *unexpected contamination*), other than *unexpected contamination* which is caused by the negligence or breach of this *Contract* by the *Contractor*, will be an *adjustment event* and the *Contractor* will be entitled to claim an adjustment to the *contract sum* in accordance with **clause 35A**.

26 Cleaning up

The *Contractor* shall keep the *site* and *WUC* clean and tidy and regularly remove rubbish and surplus material.

Within 14 days after the *date of practical completion*, the *Contractor* shall remove *temporary works* and *construction plant*. The *Independent Certifier* may extend the time to enable the *Contractor* to perform remaining obligations.

If the *Contractor* fails to comply with the preceding obligations in this clause, the *Independent Certifier* may direct the *Contractor* to rectify the non-compliance and the time for rectification.

27 Materials, labour and construction plant

Except where the *Contract* otherwise provides, the *Contractor* shall supply everything necessary for the proper performance of the *Contractor's* obligations and discharge of the *Contractor's* liabilities.

In respect of any materials, machinery or equipment to be supplied by the *Contractor* in connection with the *Contract*, the *Independent Certifier* may direct the *Contractor* to:

- (a) supply particulars of the mode and place of manufacture, the source of supply, the performance capacities and other related information; and
- (b) arrange reasonable inspection at such place or sources by the *Independent Certifier*, the *Principal* and persons authorised by the *Principal*.

28 Quality

28.1 Quality of material and work

Unless otherwise provided, the *Contractor* shall use suitable new materials and proper and tradesmanlike workmanship.

28.2 Quality assurance

If the *Contract* elsewhere requires further quality assurance, the *Contractor* shall:

- (a) plan, establish and maintain a conforming quality system; and
- (b) ensure that the *Independent Certifier* has access to the quality system of the *Contractor*, *consultants* and *subcontractors* so as to enable monitoring and quality auditing.

Any such quality system shall be used only as an aid to achieving compliance with the *Contract* and to document such compliance. Such system shall not discharge the *Contractor's* other obligations under the *Contract*.

28.3 Defective work

If the *Independent Certifier* becomes aware of *work* done (including material provided) by the *Contractor* which does not comply with the *Contract*, the *Independent Certifier* shall as soon as practicable give the *Contractor* written details thereof. If the subject *work* has not been rectified, the *Independent Certifier* may direct the *Contractor* to do any one or more of the following at the *Contractor's* cost (including times for commencement and completion):

- (a) remove the material from the *site*;
- (b) demolish the *work*;
- (c) redesign, reconstruct, replace or correct the *work*; and
- (d) not deliver it to the *site*.

28.4 Acceptance of defective work

Instead of a *direction* pursuant to **subclause 28.3**, the *Principal* may direct the *Contractor* that the *Principal* elects to accept the subject *work*, and such direction will be an *adjustment event* and the *Independent Certifier* may adjust the *contract sum* accordingly.

28.5 Timing

The *Independent Certifier* or the *Principal*, as applicable, may give a *direction* pursuant to this clause at any time before the expiry of the last *defects rectification period*.

29 Examination and testing

29.1 Tests

At any time before the expiry of the last *defects rectification period*, the *Independent Certifier* may (acting reasonably) direct that any *WUC* be tested. The *Contractor* shall give such assistance and samples and make accessible such parts of *WUC* as may be directed by the *Independent Certifier*.

29.2 Covering up

The *Independent Certifier* may direct that any part of *WUC* shall not be covered up or made inaccessible without the *Independent Certifier's* prior written *direction*.

29.3 Who conducts

Tests shall be conducted as provided elsewhere in the *Contract* or by the *Independent Certifier* or a person (which may include the *Contractor*) nominated by the *Independent Certifier*.

29.4 Notice

The *Independent Certifier* or the *Contractor* (whichever is to conduct the *test*) shall give reasonable written notice to the other of the date, time and place of the *test*. If the other does not attend, the *test* may nevertheless proceed.

29.5 Delay

Without prejudice to any other right, if the *Contractor* or the *Independent Certifier* delays in conducting a *test*, the other, after giving reasonable written notice of intention to do so, may conduct the *test*.

29.6 Completion and results

On completion of the *tests*, the *Contractor* shall make good *WUC* so that it fully complies with the *Contract*.

Results of *tests* shall be promptly made available by each party to the other and to the *Independent Certifier*.

29.7 Costs

Costs in connection with testing pursuant to this **clause 29** shall be borne by the *Principal* except where the *Contract* otherwise provides or the *test* is consequent upon, or reveals a failure of the *Contractor* to comply with the *Contract* (including this **clause 29**).

30 Working hours

If the working hours and working days on the *site* are not stated elsewhere in the *Contract*, they shall be as notified by the *Contractor* to the *Independent Certifier* before commencement of *work* on *site*.

31 Programming

The *Contractor* has prepared the *baseline program* and the *baseline program* is the program for the *WUC* at the date of this *Contract*.

The *Contractor* will update the *baseline program* to take into account any *EOTs* approved by the *Independent Certifier* in accordance with this *Contract*. The *Contractor* must provide a copy of such updated *baseline program* to the *Independent Certifier* promptly.

The *Independent Certifier* may have regard to the *baseline program* when assessing claims for *EOTs* under the *Contract*.

32 Suspension

32.1 Independent Certifier's suspension

The *Independent Certifier* may direct the *Contractor* to suspend the carrying out of the whole or any part of *WUC* for such time as the *Independent Certifier* thinks fit, if the *Independent Certifier* is of the opinion that it is necessary:

- (a) as a result of a material breach of this *Contract* by the *Contractor* (or a *consultant*, a *subcontractor* or the employees or agents of any of the *Contractor*); or
- (b) to comply with a court order.

32.1A Principal's suspension

Without limiting **subclause 32.1**, where the *Principal* has a right under and in accordance with [\[clause 7.5\(a\)\(iv\)\]](#) of the *Unit Holders Deed* to suspend the *Contractor's* performance of this *Contract*, the *Principal* may direct the *Contractor* to suspend the carrying out of the whole or any part of the *WUC*.

32.2 Contractor's suspension

Without prejudice to its rights under **subclause 38.9**, the *Contractor* may suspend the carrying out of the whole or any part of the *WUC* if the *Principal* fails to make any payment to the *Contractor* which is due under the *Contract*, provided that the *Contractor* has given 10 *business days* prior notice to the *Principal* and the *Independent Certifier* that it intends to suspend its performance in accordance with this **subclause 32.2**, and the *Principal* has failed to remedy the relevant breach of this *Contract* in that period.

32.3 Recommencement

- (a) Where the *WUC* has been suspended in accordance with **subclause 32.1**, as soon as the *Independent Certifier* becomes aware that the reason for any suspension no longer exists, the *Independent Certifier* shall direct the *Contractor* to recommence suspended *WUC* as soon as reasonably practicable.
- (b) Subject to **subclause 32.5**, where the *WUC* has been suspended in accordance with **subclause 32.1A**, the *Principal* may direct the *Contractor* to recommence the *WUC* at any time on giving reasonable notice to the *Contractor* and *Independent Certifier*.
- (c) Where the *WUC* has been suspended in accordance with **subclause 32.2**, the *Contractor* will, as soon as reasonably practicable in the prevailing circumstances, recommence *WUC* suspended when the *Principal* has remedied the breach which gave rise to the *Contractor's* rights to suspend under **subclause 32.2**.

32.4 Cost

The *Principal* shall bear the cost of suspension pursuant to **subclause 32.1(b)** (save where the relevant court order is the result of a negligent act, negligent omission or breach of contract by the *Contractor*), **subclause 32.1A**, **subclause 32.2** or **subclause 35A.3(a)(i)** and the *Contractor* will be entitled to claim:

- (a) an *EOT* in accordance with **subclause 33.5**; and
- (b) an *adjustment event* in accordance with **clause 35A**,
as a result of such suspension.

32.5 Termination by Contractor

- (a) If the *Principal* has suspended performance of whole or part of the *WUC* under **subclause 32.1A**, and the suspension continues for a period of 180 (one hundred and eighty) *business days*, the *Contractor* may elect, by written notice to the *Principal*, to terminate this *Contract* on the date specified in such notice, subject to the provisions of **clause 39B**.
- (b) Where the *Contractor* terminates this *Contract* under this **subclause 32.5**, it will be entitled to compensation from the *Principal* in accordance with **subclause 39.2**.

33 Time and progress

33.1 Progress

The *Contractor* shall ensure that *WUC* reaches *practical completion* by the *date for practical completion*.

33.2 Notice of delay

A party becoming aware of anything which will probably cause delay to *WUC* shall promptly give the *Independent Certifier* and the other party written notice of that cause and the estimated delay.

33.3 Claim

The *Contractor* shall be entitled to such extension of time for carrying out *WUC* (including reaching *practical completion*) as the *Independent Certifier* assesses ('*EOT*'), if:

- (a) the *Contractor* is or will be delayed in reaching *practical completion* by a *qualifying cause of delay*; and
- (b) the *Contractor* gives the *Independent Certifier*, within 28 days of when the *Contractor* should reasonably have become aware of that causation occurring, a written claim for an *EOT* evidencing the facts of causation and of the delay to *WUC* (including extent).

If further delay results from a *qualifying cause of delay* evidenced in a claim under **paragraph (b)** of this **subclause**, the *Contractor* shall claim an *EOT* for such delay by as soon as reasonably practicable giving the *Independent Certifier* a written claim evidencing the facts of that delay.

33.4 Assessment

When both non-qualifying and *qualifying causes of delay* overlap, the *Independent Certifier* shall apportion the resulting delay to *WUC* according to the respective causes' contribution.

In assessing each *EOT* the *Independent Certifier* shall disregard questions of whether:

- (a) *WUC* can nevertheless reach *practical completion* without an *EOT*; or
- (b) the *Contractor* can accelerate,

but shall have regard to what prevention and mitigation of the delay has not been effected by the *Contractor*.

33.5 Extension of time

Within 28 days after receiving the *Contractor's* claim for an *EOT*, the *Independent Certifier* shall give to the *Contractor* and the *Principal* a written *direction* evidencing the *EOT* so assessed. If the *Independent Certifier* does not do so, there shall be a deemed assessment and *direction* for an *EOT* as claimed.

Notwithstanding that the *Contractor* is not entitled to or has not claimed an *EOT*, the *Principal* may at any time and from time to time before issuing the *final certificate* direct an *EOT*.

33.5A Determination of disputes

If either party is not satisfied with the *Independent Certifier's* written *direction* under **subclause 33.5** it may refer the matter for resolution under **subclause 41.3**.

33.5B Joint claims and assessment

- (a) Any claim for an *EOT* made by the *Contractor* under **subclause 33.3** may, at the *Contractor's* election, be made jointly with a claim for an adjustment to the *contract sum* under **clause 35A**, (a '*joint claim*') provided that each claim relates to the same subject matter. Any claim for an *EOT* (whether or not it is part of a *joint claim*) arising out of or in connection with an *adjustment event* is subject to **subclause 35A.2(d)**. Where there is any inconsistency between a claim procedure requirement in **subclause 33.5** and in **subclause 35A.2(a)**, the stricter requirement will apply.
- (b) Where the *Contractor* makes a *joint claim* the *Independent Certifier* will assess each claim comprising the *joint claim* together and any determination made by the *Independent Certifier* concerning a *joint claim* must determine the matters arising in respect of all other claims comprising that *joint claim*.
- (c) The parties agree that:
 - (i) any *dispute* between the parties which concerns a claim under a *joint claim* will, at the election of either party, include any matters in dispute in respect of the other claims comprising the *joint claim*; and
 - (ii) if a party makes an election under **subclause 33.5B(c)(i)**, matters in dispute in respect of each claim comprising a *joint claim* will be treated as a single *dispute* for the purposes of **clause 41**.

33.6 Practical completion

The *Contractor* shall give the *Independent Certifier* at least 14 days written notice of the date upon which the *Contractor* anticipates that *practical completion* will be reached.

When the *Contractor* is of the opinion that *practical completion* has been reached, the *Contractor* shall in writing request the *Independent Certifier* to issue a *certificate of practical completion*. Within 14 days after receiving the request, the *Independent Certifier* shall give the *Contractor* and the *Principal* either a *certificate of practical completion* evidencing the *date of practical completion* or written reasons for not doing so.

If within 14 days of receiving a request under this **subclause 33.6** to issue a *certificate of practical completion* the *Independent Certifier* fails to either:

- (a) issue a *certificate of practical completion* evidencing the *date of practical completion*; or
- (b) provide written reasons for not doing so,

either party may refer the matter for determination by expert determination under **subclause 41.3**.

If the *Independent Certifier* is of the opinion that *practical completion* has been reached, the *Independent Certifier* may issue a *certificate of practical completion* even though no request has been made.

33.7 Liquidated damages - practical completion

- (a) If WUC does not reach *practical completion* by the *date for practical completion*, the *Independent Certifier* shall certify, as due and payable to the *Principal*, liquidated damages in **Item 29(a)** for every day after the *date for practical completion* to and including the earliest of the *date of practical completion* or termination of the *Contract*.
- (b) For the avoidance of doubt, liquidated damages for delay (at the rate identified in **Item 29(a)**) will accrue and be payable separately and cumulatively for each *separable portion*.
- (c) If an *EOT* is directed after the *Contractor* has paid or the *Principal* has set off liquidated damages, the *Principal* shall forthwith repay to the *Contractor* such of those liquidated damages as represent the days the subject of the *EOT*.
- (d) The *Contractor's* maximum aggregate liability to the *Principal* for liquidated damages payable under this **subclause 33.7** is limited to the amount stated in **Item 29(b)**.
- (e) The amount of liquidated damages payable under this **subclause 33.7** shall be the *Principal's* sole and exclusive remedy for *the Works* not reaching *practical completion* by the *date for practical completion*.

~~33.7A Liquidated damages – capacity~~

- ~~(a) If the *Principal* is entitled to liquidated damages pursuant to **subclause 25.3(b)** or **25.4(b)** due to a *capacity shortfall*, then the *Independent Certifier* shall certify, as due and payable by the *Contractor* to the *Principal*, liquidated damages at the rate specified in **Item 29(c)** for each *train service entitlement* (or part thereof) not satisfied due to the *capacity shortfall* indicated in in the assessment under **subclause 25.1** and if any reassessments are made pursuant to **subclauses 25.3(a)(ii)** or **25.4(a)(ii)**, then the *Independent Certifier* must use the *capacity shortfall* indicated in the final such assessment.~~
- ~~(b) The *Contractor's* maximum aggregate liability to the *Principal* for liquidated damages payable under this **subclause 33.7A** is limited to the amount stated in **Item 29(d)**. (c) The amount of liquidated damages payable under this **subclause 33.7A** shall be the *Principal's* sole and exclusive remedy for any *capacity shortfall*.~~

33.8 Acknowledgement

- (a) Without limiting **subclauses 33.7(d)** and **33.7(e)**, the *Contractor* acknowledges that:

- (a) ~~(i)~~ the *Principal* has obligations pursuant to the *Extension Project Agreement* in connection with the completion of the *Works*;
 - (b) ~~(ii)~~ the *Principal* will suffer a loss if the *Works* ~~do not reaching~~ reach practical completion by the date for practical completion; and
 - (c) ~~(iii)~~ the liquidated damages for delay (at the rate identified in **Item 29(a)**) represent a genuine pre-estimate of the *Principal's* loss in the event that the *Works* do not reach *practical completion* by the *date for practical completion*.
- ~~(b) Without limiting **subclauses 33.7A(b)** and **33.7A(c)**, the *Contractor* acknowledges that:~~
- ~~(i) the *Principal* has obligations pursuant to the *Extension Project Agreement* in connection with *train service entitlements*;~~
 - ~~(ii) the *Principal* will suffer a loss if there is a *capacity shortfall*; and~~
 - ~~(iii) the liquidated damages for a *capacity shortfall* at the rate identified in **Item 29(c)** represent a genuine pre-estimate of the *Principal's* loss in the event that there is a *capacity shortfall*.~~

33.9 Delay damages

- (a) Subject to **subclause 33.9(b)**, for every day the subject of an *EOT* for a *compensable cause* and for which the *Contractor* gives the *Independent Certifier* a claim for delay damages pursuant to **subclause 40.1**, damages equal to the *Contractor's* actual direct costs of the delay (plus a mark up for profit and overhead) certified by the *Independent Certifier* under **subclause 40.3** shall be due and payable to the *Contractor*.
- (b) When an *EOT* for a *compensable cause* and an *adjustment event* overlap, the *Contractor* must only claim an *adjustment event*, and not an *EOT* for a *compensable cause*, to the extent of such overlap.

34 Defects liability

34.1 Defect rectification

The *Contractor* shall carry out rectification at times and in a manner causing as little inconvenience to the occupants or users of the *Works* as is reasonably possible.

As soon as possible after the *date of practical completion*, the *Contractor* shall rectify all *defects* existing at the *date of practical completion*.

On and from the *date of practical completion* until expiry of the *defects rectification period*, the *Independent Certifier* may give the *Contractor* a *direction* to add a *defect* to the *defects register* which direction:

- (a) shall identify the *defect* and the date for completion of its rectification; and
- (b) may state a date for commencement of the rectification.

The *Contractor* shall rectify each *defect* which is (or ought to have been if the *Contractor* had complied with its obligations under **subclause 34.2(a)**) recorded in the *defects register* promptly after the later of the *date of practical completion* and becoming aware of the *defect*.

34.2 Defects register

- (a) The *Contractor* must prepare and maintain a written register (*'defects register'*) which records:
- (i) each defect which the *Contractor* becomes aware of during the *defects rectification period* (including as a result of a notification from the *Principal* or *Independent Certifier* that a *defect* exists); and
 - (ii) for each *defect* referred to in **subclause 34.2(a)(i)**:
 - (A) the date on which the *Contractor* became aware of the *defect*;
 - (B) reasonable details of all steps taken by the *Contractor* to procure the rectification of the *defect* in accordance with the *Contractor's* obligation under **subclause 34.1**; and
 - (C) if applicable, the date on which the *defect* was rectified.
- (b) Within 15 *business days* after the end of:
- (i) each month during the *defects rectification period*; and
 - (ii) the *defects rectification period*,
- the *Contractor* must give to the *Principal* and the *Independent Certifier* a copy of the *defects register* (current as at the end of the relevant month or at the end of the *defects rectification period*, as applicable).

35 Discretionary Variations

35.1 Proposing discretionary variations

- (a) The *Contractor* shall not vary *WUC* other than as directed under this **clause 35** or in accordance with **clause 35A**.
- (b) At any time prior to the *date of practical completion* a party may by notice to the other party and the *Independent Certifier* propose to vary *WUC* by any one or more of the following:
- (i) increase, decrease or omit any part;
 - (ii) change the character or quality;
 - (iii) change the levels, lines, positions or dimensions;
 - (iv) carry out additional *work*; or
 - (v) demolish or remove material or *work* no longer required by the *Principal*,
- (a *'discretionary variation'*).

35.2 Notice

- (a) Within 10 *business days* of the *Principal* providing a notice under **subclause 35.1(b)**, the *Contractor* shall notify the *Principal* and the *Independent Certifier* whether it agrees in principle (subject to the provisions of this **clause 35**) to proceed with the proposed *discretionary variation* and if so, whether the proposed *discretionary variation* can be

effected. If the *Contractor* does not provide such notice, it shall be deemed that the *Contractor* does not agree with the proposed *discretionary variation*.

- (b) If the *Contractor* has stated in its notice under **subclause 35.2(a)** that it will proceed with the *discretionary variation*, within 20 *business days* of that notice the *Contractor* will provide to the *Principal* and the *Independent Certifier* an estimate of the:
 - (i) effect on the *program* (including the *date for practical completion*) of the proposed *discretionary variation*; and
 - (ii) cost (including all warranties and time-related costs, if any) of the proposed *discretionary variation*.
- (c) If the *Contractor* proposes the *discretionary variation* under **subclause 35.1(b)**, it will include with its notice under that subclause that same information it is to provide to the *Principal* under **subclause 35.2(b)**.
- (d) Within [x] *business days* of the *Contractor's* estimate under **subclauses 35.2(b)** or **35.2(c)**, the *Principal* and the *Contractor* will meet to discuss whether to proceed with the *discretionary variation* and if the parties do agree to proceed, then the matter shall be referred to the *Independent Certifier* for certification in accordance with **subclause 35.3**.

35.3 Certification of agreement to proceed

- (a) Notwithstanding that the *Principal* and the *Contractor* have reached agreement to proceed with a *discretionary variation* under **subclause 35.2(d)**, neither party will be obliged to proceed with that *discretionary variation* until:
 - (i) the agreement of the parties has been referred to the *Independent Certifier* for certification and the *Independent Certifier* has certified that the adjustment to the *contract sum* agreed by the parties is reasonable in the circumstances, having regard to the principles stated in **subclause 35.4**; and
 - (ii) each of the *Principal* and the *Contractor* have stated in writing that it accepts the *Independent Certifier's* certification under **subclause 35.3(a)(i)**.
- (b) The *Independent Certifier* will make its certification under **subclause 35.3(a)(i)** within [x] *business days* of the submission of the parties' agreement under **subclause 35.2(d)**.
- (c) The *Independent Certifier's* certification under **subclause 35.3(a)(i)** will (if accepted by the parties) be effective to:
 - (i) vary the *Principal's project requirements* to take into account the *discretionary variation*;
 - (ii) vary the *date for practical completion* in accordance with that agreement; and
 - (iii) adjust the *contract sum* in accordance with the *Independent Certifier's* certification.
- (d) If the parties do not accept the *Independent Certifier's* certification under **subclause 35.3(a)(i)**, they may still agree to proceed with the *discretionary variation* and the *contract sum* will be adjusted by an amount as agreed between them and the

Principal's project requirements and the date for practical completion will be varied accordingly.

35.4 Pricing Principles

The *Independent Certifier* ~~shall price~~ when certifying an adjustment to the *contract sum* under subclause 35.3(a)(i) (due to a *discretionary variation* ~~or~~) or when pricing an adjustment under subclause 35A.4 (due to an *adjustment event* ~~with~~) will have regard to what is reasonable in the circumstances, taking into account the following principles (in order of precedence):

- (a) prior agreement of the parties, if the *Independent Certifier* considers it reasonable in the circumstances given the nature of the work required by the *discretionary variation* or *adjustment event*; and
- (b) reasonable rates or prices, which shall include a reasonable amount for profit and overheads,

and any deductions certified by the Independent Certifier shall include a reasonable amount for profit but not overheads.

35A Adjustment Events

35A.1 Adjustment events

Each of the following is an *adjustment event*:

- (a) any act of prevention, negligent act, negligent omission or breach of this *Contract* by the *Independent Certifier* (its agents, employees, contractors, subcontractors or consultants), the *Principal* (its agents, employees, contractors, subcontractors or consultants, other than the *Contractor*), except where the act of prevention, negligence or the breach is due to the *Contractor's* failure to comply with its obligations under this *Contract* or some other wrongful act or omission of the *Contractor* or its agents, employees, contractors, *subcontractors* or *consultants*;
- (b) any delay (except to the extent contributed to by the *Contractor*) in providing the *Contractor* with access to port or other coal supply chain land or infrastructure, where the provision of such is required to be completed in order for the *Contractor* to commence or carry out the *WUC*;
- (c) industrial action other than industrial action which is specific to the *site* or which is limited to the *Contractor's* employees;
- (d) inclement weather which affects part or all of the *site* or delays or disrupts the *WUC*;
- (e) delay or disruption to the *WUC* which occurs as a result of either the *Principal* or *Contractor* complying with an injunction or other court order in relation to the *site* or the *WUC* (other than where caused by the default or negligence of the *Contractor*);
- (f) any delay by the *Principal* in providing access to the *site* for the *Contractor* to commence or carry out the *WUC* (if so required by the *Contract*);
- (g) a *latent condition* that is an *adjustment event* pursuant to **subclause 24.3**;

- (h) an *unexpected contamination* that is an *adjustment event* pursuant to **subclause 25A(d)(ii)**;
- (i) a *force majeure event* that is an *adjustment event* pursuant to **subclause 39A(a)**;
- (j) a change in *legislative requirements* that is an *adjustment event* pursuant to **subclause 11.2**;
- (k) a suspension that is an *adjustment event* pursuant to **subclause 32.4(b)**; and
- (l) any other matter expressly identified in this *Contract* as an *adjustment event* which gives the *Contractor* an entitlement to an adjustment to the *contract sum*.

35A.2 Notification of an adjustment event

- (a) To make a claim on any basis for or arising out of an *adjustment event* (including a claim for an *EOT*), the *Contractor* must:
 - (i) within 14 days of the earlier of when the *Contractor* becomes aware, or ought reasonably have become aware, of the commencement, or existence, of the *adjustment event*, deliver a notice in writing to the *Principal* and the *Independent Certifier*:
 - (A) notifying the *adjustment event*;
 - (B) providing details of the *adjustment event*; and
 - (C) stating all actions the *Contractor* proposes to take to mitigate the adverse consequences of the *adjustment event*;
 - (ii) within ~~28~~42 days of the earlier of when the *Contractor* becomes aware, or ought reasonably have become aware, of the commencement, or existence, of the *adjustment event*, submit a written claim for the *adjustment event* that includes detailed particulars (to the extent known at that time) of the *adjustment event*, including:
 - (A) the *adjustment event* and its cause;
 - (B) any change required to the *WUC* to overcome the effects of the *adjustment event*;
 - (C) any omission or addition to *the Works* which may be required as a result of the *adjustment event*;
 - (D) any modification required to the *Principal's project requirements* which may be required as a result of the *adjustment event*;
 - (E) any adjustment to the *contract sum* required as a result of the above;
 - (F) where the *Contractor* elects to make a *joint claim*, the number of days *EOT* claimed together with the basis of calculating that period, including evidence that the *Contractor* has been or will be delayed in reaching *practical completion*); and
 - (G) states the measures that the *Contractor* has taken or proposes to take to mitigate the adverse consequences of the *adjustment event*; and

- (iii) if the *adjustment event* or its effects continue beyond the period of ~~28~~42 days after the commencement of the *adjustment event*, submit a further written claim for the *adjustment event*:
 - (A) every 44~~28~~ days (or such other period as the parties may agree) after the first claim submitted under **subclause 35A.2(a)(ii)** until 7 days after the end of the effects of the *adjustment event*; and
 - (B) containing the information required by clause **subclause 35A.2(a)(ii)**.
- (b) A claim under **subclause 35A.2(a)** may be submitted as part of a *joint claim*.
- (c) The *Contractor* must as soon as practicable after the commencement of an *adjustment event*, use all reasonable endeavours to mitigate the adverse consequences of the *adjustment event*.
- (d) Notwithstanding any other provision of this *Contract*, compliance by the *Contractor* with **subclause 35A.2(a)** is condition precedent to any entitlement of the *Contractor* to claim adjustment to the *contract sum* or an *EOT* arising out of or in connection with an *adjustment event*. If the *Contractor* fails to comply with **subclause 35A.2(a)(iii)**, the *Contractor* is only prevented from making a claim from the last date upon which the updated claim could have been made in accordance with **subclause 35A.2(a)(iii)**.

35A.3 Work outside of Extension Land

- (a) If the *Contractor* notifies the *Principal* and the *Independent Certifier* that as a result of an *adjustment event*, *WUC* needs to be carried out, or any of the *Works* situated, outside of the *Extension Land*:
 - (i) the relevant part of the *WUC* will be immediately suspended;
 - (ii) the parties will take steps under the *Rail Corridor Agreement* with the aim of procuring that the relevant land be included as part of the *Extension Land*; and
 - (iii) notwithstanding the terms of **subclauses 35A.2(a)** or **35A.4(a)**, the *Contractor* shall not be required to submit a notice or claim under **subclause 35A.2(a)** (and the information required under that notice) and no further steps are required under this **clause 35A** until the relevant determination under the *Rail Corridor Agreement* has been given.
- (b) If the *WUC* is suspended under **subclause 35A.3(a)(i)** for a period 180 days, then subject to **clause 39B**, the *Principal* may by written notice to the *Contractor* terminate the *Contract*.
- (c) If the *Contract* is terminated pursuant to **subclause 35A.3(b)**, the *Contractor* will be entitled to compensation from the *Principal* as if the *Contract* had been terminated for convenience in accordance with **subclause 39.1**.

35A.4 Independent Certifier's determination

- (a) Subject to **subclause 35A.2(d)** and **subclause 35A.4(b)**, within 28 days of submission of a claim under **subclause 35A.2(b)(ii)** ~~and any updated claim under subclause 35A.2(b)(iii)(a)(ii)~~ the *Independent Certifier* must issue a *direction* to the *Contractor* on its assessment of the *adjustment event* including:
 - (i) any change required to the *WUC*;

- (ii) any omission or addition to *the Works*;
- (iii) any modification required to the *Principal's project requirements*;
- (iv) in accordance with **subclause 35A.4(b)**, any adjustment to the *contract sum*; and
- (v) where the claim is a *joint claim*, any entitlement to an *EOT*, which assessment must be in accordance with **clause 33**,

which is required as a result of the occurrence of the *adjustment event*.

(b) If the *adjustment event* continues or its effects continue beyond the period referred to in **subclause 35A.2(a)(ii)** and the *Contractor* submits a claim under **subclause 35A.2(a)(iii)**:

- (i) any direction issued by the *Independent Certifier* under **subclause 35A.4(a)** will be considered an "interim determination"; and
- (ii) within 28 days of the submission of a final **updated claim** under **subclause 35A.2(a)(iii)**, the *Independent Certifier* must issue a *direction* on its final assessment of the *adjustment event* including those matters referred to in **subclauses 35A.4(a)(iii), (iv) and (v)** (and such final assessment may adjust one or more of the interim determinations made under **subclause 35A.4(a)**).

(c) ~~(b)~~ In making an assessment regarding an adjustment to the *contract sum* required as a result of an *adjustment event*, the *Independent Certifier* will have regard to the pricing principles set out at **subclause 35.4**. Any assessment of an *EOT* is subject to the provisions of **clause 33**.

35A.5 Determination of disputes

If either party is not satisfied with any part or all of the *Independent Certifier's* written *direction* under **subclause 35A.4.4**, it may refer the matter for resolution under **subclause 41.3**.

35A.6 Proceed at own risk

Prior to:

- (a) receiving a *direction* from the *Independent Certifier* under **subclause 35A.4(a)**; and
- (b) where there has been a referral of a *dispute* regarding an *adjustment event* for resolution under **subclause 41.3**, the expert making its determination,

the *Contractor* may proceed with any modification to the *WUC*, which in its opinion is required to overcome the effects of an *adjustment event*, at its own risk.

35B Segment allocation and Depreciating Assets

- (a) Within 20 *business days* following any adjustment to the *contract sum* in accordance with **clauses 35** or **35A**, the *Contractor* will provide the *Principal* a breakdown of the manner in which that adjustment was allocated across the *Segments*.
- (b) The *Contractor* shall prepare the breakdown referred to in **subclause 35B(a)** in accordance with the *allocation principles*.

- (c) As soon as reasonably practicable following *practical completion* the *Contractor* will provide the *Principal* with a final statement detailing all of the cost breakdowns given to the *Principal* under **subclause 35B(a)**.
- (d) When requested to do so in writing by the *Principal* the *Contractor* must provide the *Principal* for each *Depreciating Asset* forming part of the *Works* details of when the relevant asset is installed and ready for use.

36 Payment

36.1A Advance Payment

Within 10 *business days* of the *Condition Precedent Satisfaction Date* the *Principal* will pay the *advance payment* to the *Contractor*.

36.1 Progress claims

- (a) The *Contractor* shall claim payment progressively in accordance with this **clause 36**.
- (b) On the last *business day* of each month, the *Contractor* may make a *payment claim* by submitting a claim for payment to the *Principal* setting out the *Contractor's* calculation of the progress payment payable on account of the *WUC* carried out to the date of the *payment claim*.
- (c) A *payment claim* must be given in writing to the *Independent Certifier* and the *Principal* and must:
 - (i) include details of the moneys then due to the *Contractor* pursuant to provisions of the *Contract*;
 - (ii) include the total amount previously certified under this **clause 36**;
 - (iii) include the amount of the *contract sum* being claimed by the *Contractor*;
 - (iv) provide details of any *discretionary variations* or *adjustment events* which have occurred since the previous *payment claim* made by the *Contractor*, including any necessary adjustment to the *contract sum*; and
 - (v) include such other information as the *Independent Certifier* may reasonably require.
- (d) The *Independent Certifier* shall within 10 *business days* after the *Contractor* submits the *payment claim*:
 - (i) if it agrees with the *payment claim*, adopt its assessment; or
 - (ii) if it disagrees with the *payment claim*, prepare its own assessment, and issue to the *Contractor* a progress certificate (*'progress certificate'*) for that amount.
- (e) In making its assessment under **subclause 36.1(d)** the *Independent Certifier* will measure the progress of *WUC* against each item of *work* described in the lump sum breakdown contained at **Annexure Part C**.
- (f) The parties agree that:

- (i) the first *payment claim* submitted during the term of this *Contract* will include the amount payable to the *Contractor* for the *pre-funding payment*, and the *Independent Certifier* will not be entitled to disagree with the existence or quantum of this part of the *payment claim*; and
- (ii) the *advance payment* is intended to be deducted from the last amounts payable from the *Principal* to the *Contractor* pursuant to *progress certificates* for work performed up to the date of practical completion. Accordingly, the *Independent Certifier* must deduct ~~amounts~~the lesser of:

(A) the amount equivalent to the *advance payment* ~~from; or~~

(B) the amount(s) otherwise payable under the last *progress certificate* (or last progress certificates, if necessary) ~~so that the advance payment is fully repaid to the Principal. Where the full amount of the advance payment is not deducted from progress certificates~~ for work performed up to the date of practical completion, ~~the amount not deducted is an amount due and payable from the Contractor to the Principal.~~

from the last progress certificate (or last progress certificates, if applicable).

The *Independent Certifier* must issue a *progress certificate* within 30 days of the date of practical completion certifying the amount payable, if any, by the *Contractor* to the *Principal* for the ~~remaining portion of the~~ *advance payment* ~~not already deducted by the Independent Certifier in earlier progress certificates~~.

The *Contractor* must pay to the Principal the amount certified in that progress certificate within 15 *business days* after the ~~payment certified~~date on which it is issued by the *Independent Certifier*.

- (g) The *progress certificate* (or where the *payment claim* is final, *final certificate*) shall:
 - (i) state the *payment claim* to which it relates;
 - (ii) state the amount of the payment the *Principal* is required to make;
 - (iii) specify the amount, if any, of the *advance payment*, ~~if any~~, to be deducted for that *progress certificate* (or *final certificate*) in accordance with **subclause 36.1(f)(ii)**; and
 - (iv) if the payment the *Independent Certifier* considers is due is less than the amount claimed in the *payment claim*, state why it is less and the reasons for withholding payment.
- (h) The *Principal* shall within 15 *business days* after the *Contractor* submits a *payment claim* pay the *Contractor* the amount stated in the *progress certificate* ('*progress payment*').

36.2 Certificates

Neither a *progress certificate* nor a *progress payment* shall be evidence that the subject *WUC* has been carried out satisfactorily. Payment other than *final payment* shall be payment on account only.

36.3 Not used

36.4 Final payment claim and certificate

Within 28 days after the expiry of the last *defects rectification period*, the *Contractor* shall give the *Independent Certifier* a written *final payment claim* endorsed 'Final Payment Claim' being a progress claim together with all other claims whatsoever in connection with the subject matter of the *Contract*.

Within 42 days after the expiry of the last *defects rectification period*, the *Independent Certifier* shall issue to both the *Contractor* and the *Principal* a *final certificate* evidencing the moneys finally due and payable between the *Contractor* and the *Principal* on any account whatsoever in connection with the subject matter of the *Contract*.

Those moneys certified as due and payable shall be paid by the *Principal* or the *Contractor*, as the case may be, within 7 days after the debtor receives the *final certificate*.

The *final certificate* shall be conclusive evidence of accord and satisfaction, and in discharge of each party's obligations in connection with the subject matter of the *Contract* except for:

- (a) fraud or dishonesty relating to *WUC* or any part thereof or to any matter dealt with in the *final certificate*;
- (b) any *defect* or omission in *the Works* or any part thereof which was not apparent at the end of the last *defects rectification period*, or which would not have been disclosed upon reasonable inspection at the time of the issue of the *final certificate*;
- (c) any accidental or erroneous inclusion or exclusion of any *work* or figures in any computation or an arithmetical error in any computation; and
- (d) unresolved issues the subject of any notice of *dispute* pursuant to **clause 41**, served before the 7th day after the issue of the *final certificate*.

36.5 Interest

Interest in **Item 35** shall be due and payable after the date of default in payment.

36.6 Other moneys due

The *Principal* may elect that moneys due and owing otherwise than in connection with the subject matter of the *Contract* also be due to the *Principal* pursuant to the *Contract*.

37 Payment of workers, consultants and subcontractors

37.1 Workers, consultants and subcontractors

The *Contractor* shall give in respect of a progress claim, documentary evidence of the payment of moneys due and payable to:

- (a) workers of the *Contractor* and of the *subcontractors*;
- (b) *consultants*; and
- (c) *subcontractors*,

in respect of *WUC* the subject of that claim.

If the *Contractor* is unable to give such documentary evidence, the *Contractor* shall give other documentary evidence of the moneys so due and payable to workers, *consultants* and *subcontractors*.

Documentary evidence, except where the *Contract* otherwise provides, shall be to the *Independent Certifier's* satisfaction.

37.2 Withholding payment

Subject to the next paragraph, the *Principal* may withhold moneys certified due and payable in respect of the progress claim until the *Contractor* complies with **subclause 37.1**.

The *Principal* shall not withhold payment of such moneys in excess of the moneys evidenced pursuant to **subclause 37.1** as due and payable to workers, *consultants* and *subcontractors*.

37.3 Direct payment

Before *final payment*, the *Principal*, if not aware of a relevant relation-back day (as defined in the Corporations Law) may pay unpaid moneys the subject of **subclause 37.1** directly to a worker, *consultant* or *subcontractor* where:

- (a) permitted by law;
- (b) given a court order in favour of the worker, *consultant* or *subcontractor*; or
- (c) requested in writing by the *Contractor*.

Such payment and a payment made to a worker, *consultant* or *subcontractor* in compliance with a *legislative requirement* shall be deemed to be part-satisfaction of the *Principal's* obligation to pay pursuant to **subclauses 37.1** or **36.4**, as the case may be.

38 Default or insolvency

38.1 Preservation of other rights

If a party breaches (including repudiates) the *Contract*, nothing in this clause shall prejudice the right of the other party to recover damages or exercise any other right or remedy.

38.2 Contractor's default

If the *Contractor* commits a *substantial breach* of the *Contract*, the *Principal* may, by hand or by registered post, give the *Contractor* a written notice to show cause.

Substantial breaches by the *Contractor* are:

- (a) failing to:
 - (i) not used;
 - (ii) comply with the *Contractor's defect* rectification obligations pursuant to **subclause 34**;
 - (iii) provide evidence of insurance;
 - (iv) comply with a *direction* of the *Independent Certifier* pursuant to **subclause 28.3** or **subclause 34**; or

- (v) use the materials or standards of *work* required by the *Contract*;
- (b) wrongful suspension of *work*;
- (c) subject to the provisions of the *Contract*, refusing to proceed with the *WUC* in accordance with the requirements of the *Contract* or abandoning all or substantially all of the *WUC*;
- (d) not used; and
- (e) in respect of **clause 37**, knowingly providing documentary evidence containing an untrue statement.

38.3 Principal's notice to show cause

A notice under **subclause 38.2** shall state:

- (a) that it is a notice under **clause 38** of these General Conditions;
- (b) the alleged *substantial breach*;
- (c) that the *Contractor* is required to show cause in writing why the *Principal* should not exercise a right referred to in **subclause 38.4**;
- (d) the date and time by which the *Contractor* must show cause (which shall not be less than 10 *business days* after the notice is received by the *Contractor*); and
- (e) the place at which cause must be shown.

38.4 Principal's rights

(a) If the *Contractor* fails to show reasonable cause by the stated date and time, the *Principal* may, by written notice to the *Contractor*, ~~(a)~~ suspend payment.

(b) If the *Principal* exercises its rights under **subclause 38.4(a)** and within 30 *business days* of the *Principal* exercising those rights, the *Contractor* fails:

(i) to show reasonable cause;

(ii) to remedy the breach; or

(iii) if the breach is not capable of remedy, to make other arrangements to the reasonable satisfaction of the *Principal*.

~~(b)~~ the *Principal* may, by written notice to the *Contractor*, terminate the *Contract*.

38.5 Not used

38.6 Not used

38.7 Principal's default

If the *Principal* commits a *substantial breach* of the *Contract*, the *Contractor* may, by hand or by registered post, give the *Principal* a written notice to show cause.

Substantial breaches by the *Principal* are failing to make a payment due and payable pursuant to the *Contract*.

38.8 Contractor's notice to show cause

A notice given under **subclause 38.7** shall state:

- (a) that it is a notice under **clause 38** of these General Conditions;
- (b) the alleged *substantial breach*;
- (c) that the *Principal* is required to show cause in writing why the *Contractor* should not exercise a right referred to in **subclause 38.9**;
- (d) the date and time by which the *Principal* must show cause (which shall not be less than 10 *business days* after the notice is received by the *Principal*); and
- (e) the place at which cause must be shown.

38.9 Contractor's rights

If the *Principal* fails to show reasonable cause by the stated date and time, the *Contractor* may, by written notice to the *Principal*, suspend the whole or any part of *WUC*.

The *Contractor* shall remove the suspension if the *Principal* remedies the breach.

Without prejudice to its rights under **subclause 32.5** and subject to **clause 39B** the *Contractor* may, by written notice to the *Principal*, terminate the *Contract*, if within 30 days of the date of its show cause notice under **subclause 38.8** the *Principal* fails:

- (a) to remedy the breach; or
- (b) if the breach is not capable of remedy, to make other arrangements to the reasonable satisfaction of the *Contractor*.

Following a suspension of *WUC* in accordance with this **subclause 38.9** the *Contractor* will be entitled to claim:

- (c) an *EOT* in accordance with **subclause 33.5**; and
- (d) an adjustment to the *contract sum* in accordance with **clause 35A**,

in respect of any delay or increased costs incurred by it as a result of the *WUC* being suspended.

38.10 Termination

Subject to **subclause 38.12**, if the *Contract* is terminated pursuant to **subclauses 38.4(b)** or **38.9**, subject to **clause 39B** the parties' remedies, rights and liabilities shall be the same as they would have been under the law governing the *Contract* had the defaulting party repudiated the *Contract* and the other party elected to treat the *Contract* as at an end and recover damages.

38.11 Insolvency

If an *insolvency event* occurs in respect of either party, then:

- (a) where the *insolvency event* has occurred in respect of the *Contractor*, the *Principal* may, without giving a notice to show cause, exercise the right under **subclause 38.4(b)**; or

- (b) where the *insolvency event* has occurred in respect of the *Principal*, the *Contractor* may, without giving a notice to show cause, exercise the right under **subclause 38.9**.

The rights and remedies given by this subclause are additional to any other rights and remedies. They may be exercised notwithstanding that there has been no breach of contract.

38.12 Compensation to Principal

- (a) If the *Contract* is terminated by the *Principal* in accordance with **subclause 38.4(b)** or under common law as a result of a repudiation by the *Contractor*, then:

- (i) the *Principal* is not obliged to pay any further amounts to the *Contractor* (including entitlements accrued before termination); and
- (ii) subject to **subclauses 38.12(b)** and **38.12(c)**, within 2 months after the date the *Access Regulator* makes the final decision referred to in **subclause 38.12(b)(ii)**, the *Contractor* shall pay the *Principal* the lesser of:

(A) an amount equal to [tbc]% of the *contract sum* plus the total *Trust Administration Costs*; and

(B) an amount equal to:

- (1) [tbc]% of the amount which is the difference between the *contract sum* which has been paid to the *Contractor* as at the date of termination and the amount of the *contract sum* which the *Access Regulator* has approved for inclusion in the *Regulatory Asset Base*; plus

- (2) an amount calculated as follows:

$(\text{Non-RAB amount} / \text{CS Amount}) \times \text{TTAC}$

Where:

Non-RAB amount = CS Amount less the portion of CS Amount that the *Access Regulator* has approved for inclusion in the *Regulatory Asset Base*;

CS Amount = the *contract sum* which has been paid to the *Contractor* as at the date of termination; and

TTAC = Total *Trust Administration Costs*.

- (b) The parties confirm that the *Compensation Payment* under **subclause 38.12(a)** can only be calculated once:

- (i) the *Contractor* has made a submission to the *Access Regulator* for the inclusion in the *Regulatory Access Base* of ~~some or all~~ at least 75% of the amount of the *contract sum* that has been paid to the *Contractor* as at the date of termination; and

- (ii) the *Access Regulator* has considered that submission and made a final decision as to the amount of the *contract sum* referred to in **subclause 38.12(b)(i)** to be included in the *Regulatory Asset Base*.

- (c) If, following the calculation of the *Compensation Payment*, the *Access Regulator* increases the amount of the *contract sum* paid by the *Principal* that is included in the *Regulatory Asset Base*:
 - (i) the *Compensation Payment* must be recalculated in accordance with **subclause 38.12(a)(ii) (*Revised Compensation Payment*)**; and
 - (ii) if the *Revised Compensation Payment* is less than the *Compensation Payment*, the *Principal* must refund to the *Contractor* the amount of the difference.
- (d) The amount calculated under this **subclause 38.12** shall be the *Principal's* sole entitlement to compensation arising from the termination of the *Contract*.

39 Termination for convenience

39.1 Termination by Principal

Subject to **clause 39B**, where the *Principal* has a right or obligation under and in accordance with [\[clause 7.5\(a\)\(v\)\]](#) or [\[clause 10.2\(a\)\]](#) of the *Unit Holders Deed* to terminate this *Contract*, it may by 40 *business days* written notice to the *Contractor* terminate this *Contract*.

39.2 Compensation

If this *Contract* is terminated pursuant to **subclauses 32.5, 35A.3(b) or 39.1** then the *Principal* shall be liable to pay the *Contractor* the total of:

- (a) for *work* executed prior to the date of termination and for which the *Contractor* has not been paid, the amount which would have been payable for that *work* if the *Contract* had not been terminated;
- (b) actual costs incurred by the *Contractor* prior to the date of termination, including (but not limited to) the cost of materials reasonably ordered by the *Contractor* for *WUC*, which the *Contractor* is liable to accept;
- (c) the costs of the *Contractor* in demobilising from the *WUC* and the *site*, including (but not limited to) demobilisation of personnel and the cost of removal of *construction plant* (which for the avoidance doubt include break costs and/or early termination fees payable to *subcontractors* and *consultants*); and
- (d) the break fee specified in **Item 36A** (save where the termination was pursuant to **subclause 35A.3(b)** and the relevant *adjustment event* did not arise out of a breach of contract or negligent act or negligent omission of the *Principal*).

39A Force Majeure

- (a) If a *force majeure event* causes delay or disruption to the *WUC* or otherwise affects the performance of the *Contract*, the *Contractor* will be entitled to claim:
 - (i) an *EOT* in accordance with **subclause 33.5**; and
 - (ii) an *adjustment event* in accordance with **clause 35A**,
 in respect of the effects of the *force majeure event* to the extent such effects could not have been avoided or mitigated by the *Contractor* taking reasonable steps.

The *Contractor* shall be entitled to recover from the *Principal* the costs incurred in taking such reasonable steps.

- (b) Subject to **clause 39B**, if a delay caused by a *force majeure event* continues for more than 180 days, the *Principal* party may terminate this *Contract* by giving written notice to the *Contractor*.

39B Pre-termination work

- (a) If the *Principal* or the *Contractor* (as applicable) provides to the other party a termination notice under **subclauses 32.5(a), 35A.3(b), 38.9, 39.1 or 39A** such notice (or as part of that notice where it is should it be given by the *Contractor*) shall be a deemed instruction to the *Contractor* to:
 - (i) remove *Redundant Extension Infrastructure*; and
 - (ii) restore the *site* to the condition it was in prior to the commencement of the *WUC*,
 (the '*pre-termination work*').
- (b) The *Contractor* may within [21 days] of the termination notice elect to proceed with all, some or none of the *pre-termination work* under a deemed instruction under **subclause 39B(a)**.
- (c) The *Principal* agrees that it is responsible to pay the *Contractor* under this *Contract* for all *pre-termination work* that the *Contractor* elects to undertake under **subclause 39B(b)** and that the *Contractor* undertaking such *pre-termination work* will be an *adjustment event* entitling the *Contractor* to claim an adjustment to the *contract sum* in accordance with **clause 35A**.
- (d) If the *Contractor* exercises its entitlement to undertake *pre-termination work* under **subclause 39B(b)**, this *Contract* will remain on foot only to the extent necessary to facilitate the performance of the *pre-termination work* until the later of:
 - (i) the date on which the *Contractor* notifies the *Principal* that the *pre-termination work* is complete; and
 - (ii) the date on which this *Contract* would have terminated but for the operation of this **clause 39B**,
 after which date the *Contract* is terminated.
- (e) If the *Contractor* does not exercise its entitlement to undertake *pre-termination work* under **subclause 39B(b)**, this *Contract* will terminate the date on which the *Contract* would have terminated in the absence of this **clause 39B**.

40 Notification of claims

40.1 Communication of claims

The *prescribed notice* is a written notice of the general basis and quantum of the claim.

As soon as practicable after a party becomes aware of any claim in connection with the subject matter of the *Contract*, that party shall give to the other party and to the *Independent Certifier* the *prescribed notice* or a notice of *dispute* under **subclause 41.2**.

This subclause and **subclause 40.3** shall not apply to any claim, including a claim for payment (except for claims which would, other than for this subclause, have been included in the *final payment claim*), the communication of which is required by another provision of the *Contract*.

40.2 Liability for failure to communicate

The failure of a party to comply with the provisions of **subclause 40.1** or to communicate a claim in accordance with the relevant provision of the *Contract* shall, inter alia, entitle the other party to damages for breach of the *Contract* but shall neither bar nor invalidate the claim.

40.3 Independent Certifier's decision

If within 28 days of giving the *prescribed notice* the party giving it does not notify the other party and the *Independent Certifier* of particulars of the claim, the *prescribed notice* shall be deemed to be the claim.

Within 56 days of receipt of the *prescribed notice* the *Independent Certifier* shall assess the claim and notify the parties in writing of the decision. Unless a party within a further 28 days of such notification gives a notice of *dispute* under **subclause 41.2** which includes such decision, the *Independent Certifier* shall certify the amount of that assessment to be moneys then due and payable.

41 Dispute resolution

41.1 Procedure for resolving Disputes

Any dispute between the *Principal* and the *Contractor* arising out of or in connection with this *Contract* or the *WUC* (including questions concerning this *Contract's* existence, meaning or validity) ('*dispute*') must be resolved in accordance with the procedures set out in this **clause 41**.

41.2 Negotiation

- (a) If a *dispute* (other than a *dispute* referred under subclause **33.5A** or **35A.5**) arises then a party may give notice to the other party requesting that the *dispute* be referred for resolution by negotiation between the representatives of the parties, being:
- (i) in the case of the *Contractor*, its chief executive officer (or his or her delegate); and
 - (ii) in the case of the *Principal*, a senior representative who has authority to resolve the *dispute*,
- (the '*senior executives*').
- (b) A notice under **subclause 41.2(a)** must:
- (i) state that it is a notice under **subclause 41.2(a)**; and

- (ii) include or be accompanied by reasonable particulars of the matters the subject of the *dispute*.
- (c) If a *dispute* is referred for resolution by negotiation under **subclause 41.2(a)**, then the *senior executives* must meet and use reasonable endeavours acting in good faith to resolve the *dispute*. The joint decision (if any) of the *senior executives* will be reduced to writing and will be contractually binding on the parties.
- (d) If the *dispute* remains unresolved (in whole or in part) 15 *business days* after the date on which the notice referred to in **subclause 41.2(a)** was served, then:
 - (i) either party may refer the matter to litigation; or
 - (ii) the *senior executives* may jointly resolve to refer the matter to expert determination under **subclause 41.3**.

41.3 Expert determination

If a *dispute* has been referred to expert determination pursuant to **subclauses 33.5A, 35A.5, 33.6** or **41.2(d)(ii)**, then **subclauses 41.4** to **41.8** (inclusive) shall apply.

41.4 Selection of expert

- (a) If a *dispute* under **subclauses 33.5A, 35A.5** or **41.2(d)(ii)** is referred to expert determination, the parties must nominate (by mutual agreement) an expert to determine the *dispute*.
- (b) If the parties have not nominated an expert within 5 *business days* of a *dispute* under **subclauses 33.5A, 35A.5** or **41.2(d)(ii)** being referred to expert determination, then the expert is to be nominated (at the request of either party by):
 - (i) where the parties agree the dispute is:
 - (A) purely of a technical nature, the President (for the time being) of Engineers Australia – Queensland Division); or
 - (B) purely of a financial or accounting nature, the President (for the time being) of The Institute of Chartered Accountants in Australia – Queensland Branch; and
 - (ii) in all other cases, the President (for the time being) of the Queensland Law Society.
- (c) If the expert is to be nominated by a person referred to in **subclause 41.4(b)** and that person declines to nominate a person as the expert but provides a list of people that could be appointed as the expert:
 - (i) the first person specified in that list will be taken to be nominated as the expert;
 - (ii) if the first person specified in that list does not accept the appointment as the expert, the next person specified in that list will be taken to be nominated as the expert; and
 - (iii) the process specified in **subclause 41.4(c)(ii)** will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the expert accepts the appointment as the expert;

- (d) Subject to **subclause 41.4(c)**, if the expert is to be nominated by a person referred to in **subclause 41.4(b)** and the person nominated as the expert does not accept the appointment as the expert, then an alternative person is to be nominated as the expert (at the request of either party) by the same person referred to in **subclause 41.4(b)**.
- (e) It is the intention of the parties that the expert appointed to determine a *dispute* will be a person with appropriate skills having regard to the nature of the matters in *dispute*.
- (f) Any agreement for expert determination under this *Contract* will not constitute an arbitration agreement for the purposes of the *Commercial Arbitration Act 2013* (Qld).
- (g) The *Principal* and the *Contractor* must enter into an agreement with the expert on the terms of the form of agreement contained in **Annexure Part L** or such other reasonable terms as the expert may require.

41.5 Rules of expert determination

The expert determination process will be administered, and the expert will be required to act in accordance with the terms of the agreement in **Annexure Part L**.

41.6 Expert finding

- (a) The determination of the expert must be in writing and will be final and binding on the parties.
- (b) Upon submission by any party, the expert may amend the determination to correct:
 - (i) a clerical mistake;
 - (ii) an error from an accidental slip or omission;
 - (iii) a material miscalculation of figures or a material mistake in the description of any person, thing or manner; or
 - (iv) a defect in form.

41.7 Costs

The *Principal* and the *Contractor* must bear their own costs in connection with the expert determination proceedings and must pay an equal portion of the cost of the expert.

41.8 Place of expert determination

The place of any expert determination will be Brisbane.

41.9 Continue to perform

Notwithstanding the existence of a *dispute*, each party must continue to perform its obligations under this *Contract*.

41.10 Summary or urgent relief

Nothing will prejudice the right of a party to institute proceedings to seek urgent injunctive, interlocutory or declaratory relief.

42 Waiver of conditions

Except as provided at law or in equity or elsewhere in the *Contract*, none of the terms of the *Contract* shall be varied, waived, discharged or released, except with the prior written consent of the parties.

43 Liability

43.1 Liability cap

- (a) Subject to **subclause 43.1(b)**, the *Contractor's* maximum aggregate liability to the *Principal*:
- (i) under this *Contract*;
 - (ii) in tort (including negligence);
 - (iii) under any statute; and
 - (iv) otherwise at law,
- and irrespective of how it arises, is limited to the amount specified in **Item 37**.
- (b) The limitation of liability in this **clause 43** does not apply:
- (i) to the extent that the liability of the *Contractor* to the *Principal* is an insured liability in accordance with the terms of a policy of insurance required to be effected and maintained under this *Contract*, in respect of an amount equal to any amount recovered by the *Contractor* under any such policy of insurance (or which would have been received but for the *Contractor's* breach of this *Contract* or a failure to comply with any relevant insurance policy);
 - (ii) to any amounts due under the indemnity under **subclause 10.1(c)**;
 - (iii) to any liquidated damages due and payable under **subclause 33.7**; or
 - (iv) to any loss:
 - (A) arising from:
 - (1) fraud of the *Contractor*;
 - (2) criminal conduct of the *Contractor*;
 - (3) the death or injury of any person;
 - (4) loss, damage to, or destruction of, any property other than the *WUC*; or
 - (5) any claim for payment made by the *Contractor's* employees; or
 - (B) that cannot be excluded by law.

43.2 Exclusion of consequential loss

- (a) A party will not be liable for any *Consequential Loss*:
- (i) pursuant to this *Contract*;

- (ii) arising from any *Claim* in connection with or by reason of this *Contract*; or
 - (iii) under an indemnity given by a party to another party under this *Contract*, save and except for *Consequential Loss* where:
 - (iv) any *Claim* for the *Consequential Loss* is one which the party is insured under an insurance policy required under the *Transaction Documents* and then to the extent the party receives the proceeds of the policy of insurance;
 - (v) there is an entitlement of the *Principal* to recover a loss from the *Contractor* under another *Transaction Document* (subject to the terms of that *Transaction Document*);
 - (vi) such exclusion is otherwise prohibited by law; or
 - (vii) the *Consequential Loss* is caused or contributed to by that party committing:
 - (A) a wilful default, being a deliberate breach of a material obligation with the knowledge that (or with conscious disregard as to whether) the breach was likely to have harmful consequences, but does not include any innocent mistake or error of judgment; or
 - (B) fraud (as defined by civil common law of Queensland), but only to the extent caused or contributed to by such wilful default or fraud.
- (b) This **subclause 43.2** survives termination of this *Contract*.

44 GST

44.1 Construction

In this **clause 44**:

- (a) unless there is a contrary indication, words and expressions which are not defined in this *Contract* but which have a defined meaning in GST Law have the same meaning as in the GST Law; and
- (b) references to GST payable and input tax credit entitlement include GST payable by, and the input tax credit entitlement of, the representative member for a GST group of which the entity is a member and the GST joint venture operator of any GST joint venture of which the entity is a participant.

44.2 Consideration GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this *Contract* are exclusive of GST.

44.3 Payment of GST

If GST is payable on any supply made by a party (or any entity through which that Party acts) (**Supplier**) under or in connection with this *Contract*, the recipient of the supply will pay to the Supplier an amount equal to the GST payable on the supply.

44.4 Timing of GST payment

The amount referred to in **subclause 44.3** must be paid in addition to and at the same time and in the same manner (without any set-off or deduction) that the consideration for the supply is to be provided under this *Contract*.

44.5 Tax invoice

The Supplier must deliver a tax invoice or an adjustment note to the recipient of a taxable supply before the Supplier is entitled to payment of an amount under **subclause 44.3**, and the recipient can withhold payment of the amount until the Supplier provides a tax invoice or an adjustment note, as appropriate.

44.6 Adjustment event

If an adjustment event arises in respect of a taxable supply made by a Supplier under this *Contract*, the amount payable by the recipient under **subclause 44.3** will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier, or by the Supplier to the recipient, as the case requires.

44.7 Reimbursements

Where a party is required under this *Contract* to pay for, reimburse or contribute to any expense, loss, liability or outgoing of another party or indemnify another party in relation to such an expense, loss, liability or outgoing, the amount required to be paid, reimbursed or contributed by the first party will be the sum of:

- (a) the amount of the expense, loss, liability or outgoing less any input tax credits in respect of the expense, loss, liability or outgoing to which the other party is entitled; and
- (b) if the payment, reimbursement or contribution is subject to GST, an amount equal to that GST.

44.8 Calculations based on other amounts

If an amount of consideration payable or to be provided under or in connection with this *Contract* is to be calculated by reference to:

- (a) any expense, loss, liability or outgoing suffered or incurred by another person (**Cost**), that reference will be to the amount of that Cost excluding the amount of any input tax credit entitlement of that person relating to the Cost suffered or incurred; and
- (b) any price, value, sales, proceeds, revenue or similar amount (**Revenue**), that reference will be to that Revenue determined by deducting from it an amount equal to the GST payable on the supply for which it is consideration.

Annexure – Part A

Annexure to the Australian Standard General Conditions of Contract for Design and Construct

This **annexure** shall be completed and issued as part of the tender documents and, subject to any amendments to be incorporated into the *Contract*, is to be attached to the General Conditions of Contract and shall be read as part of the *Contract*.

Item

1	<i>Principal</i> (clause 1)	ACN	ABN
2	<i>Principal's address</i>	Phone	Fax
3	<i>Contractor</i> (clause 1)	ACN	ABN
4	<i>Contractor's address</i>	Phone	Fax
5	<i>Independent Certifier</i> (clause 1)	ACN	ABN
6	<i>Independent Certifier's address</i>	Phone	Fax
7	<i>Date for practical completion</i> (clause 1)	As stated in the Separable Portions Annexure.	
7A	<i>Amount of pre-funding payment</i> (clause 1)	\$[<i>to be inserted</i>]	
7B	<i>Amount of advance payment</i> (clause 1)	5% of the <i>contract sum</i> .	
7C	<i>Amount of advance deduction amount</i> (clause 1)	means, in respect of a <i>progress certificate</i> , an amount equal to 5% of the applicable <i>payment claim</i> by the <i>Contractor</i> that is certified for payment under subclause 36.1 ;	
7D	<i>Peak termination exposure amount</i> (clause 1)	\$[<i>to be inserted</i>]	

8	Governing law (subclause 1.2(h))	the law of the State of Queensland If nothing stated, that of the jurisdiction where the <i>site</i> is located
9	(a) Currency (subclause 1.2(g))	Australian dollars If nothing stated, that of the jurisdiction where the site is located
	(b) Place for payments (subclause 1.2(g))	If nothing stated, the <i>Principal's</i> address
9A	The <i>Principal's Approvals</i> (clause 1)	<i>[to be inserted]</i>
10	The <i>Principal's project requirements</i> are described in the following documents (clause 1)	1 <i>Preliminary design</i> (if included in <i>Item 11</i>) 2 The scope of work contained in Annexure Part C . 3 4 5
11	<i>Preliminary design</i> (clause 1)	(a) <i>A preliminary design</i> * is included * is not included in the <i>Principal's project requirements</i> . If neither deleted, a <i>preliminary design</i> is not included (b) The <i>preliminary design</i> documents are: 1 <i>[to be inserted]</i> 2 3 4 5
12	Not used	
13	<i>Provisional sum</i> , percentage for profit and attendance (clause 3)	<i>[to be inserted]</i> %
14	Credit rating of issuer of <i>security</i> (subclause 5.2)	a long-term credit rating by Standard & Poors Rating Services of at least A (or the equivalent rating by another internationally recognised ratings agency)
15	Not used	
16	Not used	

17	Documents, numbers of copies, and the times or stages at which they are to be supplied by the <i>Contractor</i> (subclause 8.3)		
	Document	No. of copies	Time/stage
	1	[to be inserted]	
	2		
	3		
	4		
	5		
18	Time for <i>Independent Certifier's direction</i> about documents (subclause 8.3)	days If nothing stated, 14 days	
19	Not used		
20	Not used		
21	Not used		
22	<i>Legislative requirements</i>		
	(a) Those excepted (subclause 11.1)	[to be inserted]	
	(b) Identified <i>WUC</i> (subclause 11.2(a)(i)(C))	[to be inserted]	
23	Insurance of <i>the Works</i> (clause 16A)	Refer to <i>Insurance Schedule</i> .	
24	Professional indemnity insurance (clause 16B)		
	(a) Levels of cover of <i>Contractor's</i> professional indemnity insurance shall be not less than	Refer to <i>Insurance Schedule</i> .	
	(b) Period for which <i>Contractor's</i>		

professional indemnity insurance shall be maintained after issue of the *final certificate* If nothing stated, 6 years

(c)	Categories of <i>consultants</i> and levels of cover of <i>consultants'</i> professional indemnity insurance	Category <i>[to be inserted]</i>	Levels of cover \$ \$ \$ \$ If nothing stated, \$1 000 000
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(d) Period for which each *consultant's* professional indemnity insurance shall be maintained after issue of the *final certificate* If nothing stated, 6 years

25 Public liability insurance (**clause 16**) Refer to *Insurance Schedule*.

Amount per occurrence shall be not less than \$

25A *Principal's representative* (**subclause 21(b)**)

Contractor's representative (**subclause 21(b)**)

26 Not used

27	The information, materials, documents or instructions and the times by, or periods within which they are to be given to the <i>Contractor</i>	Documents or instructions 1 <i>[to be inserted]</i> 2 3 4	Times/Periods
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	(clause 31)	5
28	Not used	
29(a)	Liquidated damages - practical completion, rate (subclause 33.7)	Refer to Separable Portions Annexure
29(b)	Liquidated damages - practical completion, maximum payable (subclause 33.7)	[to be inserted]% of the <i>contract sum</i>
29(c)	Liquidated damages— capacity, rate (subclause 33.7A)	[to be inserted]
29(d)	Liquidated damages— capacity, maximum payable (subclause 33.7A)	For liquidated damages— capacity payable pursuant to subclause 25.4(b) (i.e. where the capacity change is greater than or equal to the minimum capacity change):— [to be inserted]% of the contract sum For liquidated damages— capacity payable pursuant to subclause 25.3(c) (i.e. where the capacity change is less than the minimum capacity change and the Principal has issued a notice electing to recover liquidated damages pursuant to subclause 25.3(c)):- [to be inserted]% of the contract sum
30	Not used	
31	Other <i>compensable causes</i> (paragraph (b) of clause 1 and subclause 33.9)	[to be inserted]
32	<i>Defects rectification period</i> (clause 34)	the period commencing on the date of this <i>Contract</i> and ending 13 months after the later of: <ol style="list-style-type: none"> 1— date of practical completion; and 2— if the assessment under subclause 25.1 indicates that there is a capacity shortfall, the later of the following dates: <ol style="list-style-type: none"> a. the date a subsequent assessment under subclauses 25.3 or 25.4 (and where there is more than one subsequent assessment, the last to occur) indicates that the capacity change is equal to or greater than the minimum capacity change; b. the date a subsequent assessment under subclauses 25.3 or 25.4 indicates that the capacity change is equal to or greater than the required

~~capacity change; and~~

~~e.~~

~~the date~~

33 Not used

34 Not used

35 Interest rate on overdue payments
(**subclause 36.5**) % per annum
If nothing stated, 18% per annum

36 Not used

36A Break fee
(**subclause 39.2(d)**) *[to be inserted]*

37 Liability cap
(**subclause 43.1(a)**) ~~The~~ *[to be inserted with an amount that does not exceed the contract sum]*

~~38~~ ~~minimum capacity change~~ ~~(clause 4)~~ ~~[0.x] x required extension capacity;~~

Separable Portions Annexure

Separable portion (clause 1)	No. 1
Description of <i>Separable Portion</i> (clause 1)	[to be inserted]
<i>Date for Practical Completion</i> (clause 1)	[to be inserted]
Liquidated damages - <i>practical completion</i> , rate (clause 33.7)	[to be inserted]
Separable portion (clause 1)	No. 2
Description of <i>Separable Portion</i> (clause 1)	[to be inserted]
<i>Date for Practical Completion</i> (clause 1)	[to be inserted]
Liquidated damages - <i>practical completion</i> , rate (clause 33.7)	[to be inserted]
Separable portion (clause 1)	No. 3
Description of <i>Separable Portion</i> (clause 1)	[to be inserted]
<i>Date for Practical Completion</i> (clause 1)	[to be inserted]
Liquidated damages - <i>practical completion</i> , rate (clause 33.7)	[to be inserted]

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Rendering set	Standard

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<u>Insertion</u>	
Deletion	
Moved from	
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Style change	
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Split/Merged cell	
Padding cell	

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Insertions	287
Deletions	356
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Moved to	2
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Format changed	0
Total changes	647